

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., INC., a corporation, and POPULAR MELODIES, INC., a corporation,

Appellants,

VS.

TRIANON COMPANY, INC., a corporation,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Western District of Washington,  
Northern Division.

FILED

AUG 5 - 1939

PAUL P. O'BRIEN,

CLERK



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL

SWEENEY & HAUGLAND,

H. W. HAUGLAND,

905 Arctic Bldg.,

Seattle, Washington,

and

HERMAN D. KENIN,

1412 Public Service Bldg.,

Portland, Oregon,

Attorneys for Appellants.

CLARK R. BELKNAP,

% Law Library,

County-City Bldg.,

Seattle, Washington,

Attorney for Appellee. [1\*]

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\*Page numbering appearing at the foot of page of original certified Transcript of Record.

United States District Court  
Northern Division, Western District of Washington

No. 1162

In Equity

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPEL & CO., INC., a corporation, and POPULAR MELODIES, INC., a corporation,

Plaintiffs,

vs.

TRIANON COMPANY, INC., a corporation,  
Defendant.

### BILL OF COMPLAINT

The complaint of the plaintiffs alleges the following facts, common and applicable to each separate count of the bill of complaint, to-wit:

1. That the plaintiff, American Society of Composers, Authors and Publishers (hereinafter referred to, for brevity's sake, as the "Society"), at all times hereinafter mentioned, was and still is an unincorporated association duly organized and existing under and by virtue of the laws of the State of New York, and has its principal place of business in the Borough of Manhattan, City of New York, in the State of New York, in the Southern District of New York. That the membership of the Society exceeds 700, and is comprised of authors, composers



and publishers of musical works; that said Society was organized and is now operating for the purpose of protecting the performing rights in musical works, copyrighted by said members respectively, against infringement because of the public performance thereof for profit.

2. That Gene Buck is President of said Society; that because said membership, as is above indicated, is exceedingly numerous and it would be impractical to join all the members of said Society as parties plaintiff, and the issues and questions involved here are of common and general interest to all of the members of said Society, the said Society has duly authorized and empowered the said Gene Buck as President thereof to institute and prosecute this suit in its behalf, and this action is accordingly brought by [2] said plaintiff, Gene Buck as President of the American Society of Composers, Authors and Publishers, for and on behalf of said Society.

3. That each of the plaintiffs described as a corporation, in the caption hereof, was and still is a corporation, duly organized and existing under the laws of the State of New York; and all of said corporations were and still are engaged in the business of printing, publishing and vending of copyrighted musical works.

4. That the defendant at all the times hereinafter mentioned was and still is a corporation duly organized and existing under the laws of the State of Washington.

5. Upon information and belief, that at all the times hereinafter mentioned, the defendant owned, controlled, managed and operated, and still owns, manages, controls and operates a certain place of business, for public entertainment, accommodation, amusement and/or refreshment, known as Trianon Ballroom, located at 218 Wall Street, in the City of Seattle, within King County, in the State of Washington, in this District. That in connection with the operation of such place of business and as part of the entertainment given thereat, and for the purpose of attracting trade and custom thereto, musical compositions were and are publicly played and performed, for profit, for the entertainment and amusement of patrons attending such place, and to make said place of business an attractive place for the patronage of the general public.

6. That the several corporate plaintiffs named in the caption hereof, jointly with American Society of Composers, Authors and Publishers, have causes of action against the defendant, which are properly joined in one action. That each cause of action asserted against the defendant is based on infringement by the defendant because of the public performance for profit and for purposes of profit of the several musical compositions, copyrights of which are owned by some one of the plaintiffs herein; that each of the corporate plaintiffs, for a valuable consideration, has heretofore duly assigned, transferred and set over to the Society the exclusive non-dramatic public performing rights in and to

any and all musical compositions then owned or thereafter acquired and copyrighted by the corporate plaintiffs respectively, [3] including the compositions hereinafter specifically set forth, for a term beginning January 1, 1936, and ending January 1, 1941.

7. That the Society is the sole and exclusive owner of the non-dramatic public performing rights in and to each and all of the copyrighted musical compositions hereinafter mentioned; that said Society, as assignee of said performing rights aforesaid, is solely entitled to the damages, costs and attorney's fees prayed for herein; that all of the corporate plaintiffs are members of said Society and as members thereof, and in their own right, as the respective owners of the copyrights hereinafter mentioned, with said Society, are jointly and severally interested in the several injunctions against the defendant, prayed for herein; that each of the infringements of the copyrights, by defendant, hereinafter complained of, occurred in, and in connection with the operation of, defendant's place of business aforesaid; that all of the actions joined in this bill are governed by the same legal rules and involve similar facts, and there is a community of interest among the plaintiffs in the questions at issue and the remedies sought; that the convenient administration of justice will be promoted by such joinder, and a multiplicity of separate actions against the defendant, arising on similar states of fact, will be avoided.



## First Count

8. For first cause of action against the defendant, the plaintiffs allege all of the facts set forth in paragraphs 1 to 7 preceding the first count, but for the sake of brevity, such allegations are not repeated but are adopted by reference.

9. That prior to the 9th day of December, 1935, Ted Koehler, a citizen of the United States, originated, devised, created, and wrote the words and lyrics of a new and original musical composition, and that also prior to the said date, Jimmy McHugh, a citizen of the United States, composed and set original music to the said words and lyrics, and the said words and lyrics, together with the said music, constituted a musical composition, entitled "Lovely Lady". [4]

10. That prior to the 9th day of December, 1935, the said author and composer assigned such composition to Robbins Music Corporation, (hereinafter in this count referred to as "the Publisher"), including all rights therein, and the right to secure copyright therein.

11. That thereafter and on the 9th day of December, 1935, the Publisher duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright MCMXXXV, By Robbins Music Corporation, New York, New York".

12. That after publication of such composition with such notices of copyright, the said Publisher

promptly, on the 10th day of December, 1935, deposited in the office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, accompanied by a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work, and said work was duly registered by the said Register of Copyrights, who thereupon issued certificate of copyright registration therefor as Class E., Pub. No. 52007; that a full, true and correct copy of said certificate is attached hereto, marked "Exhibit A", and by this reference made a part hereof.

13. That since the date hereinabove mentioned in the paragraph next preceding of this count, such composition has been published by the Publisher. That upon each copy of such composition so published, there has been inscribed on the first page of the music the copyright notice required by law, in the words and figures set forth hereinabove.

14. That the Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in this count, and all the rights secured under such copyright, except as to the rights assigned to the Society as set forth in paragraphs 6 and 7 hereof; that the Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in said paragraphs, up to and including the 1st day of January, 1941, and that by virtue of such assignment the Publisher holds in

trust for the Society, the exclu- [5] sive non-dramatic performing rights of said musical composition secured by said copyright down to and including the 1st day of January, 1941.

15. Upon information and belief, that the defendant, on November 30, 1936, and at other times prior to and subsequent thereto, without the knowledge or consent of the Society, or of the Publisher, and in infringement of such copyright, and with full knowledge of the Society's rights in such work and of such copyright belonging to the Publisher, gave public performances and renditions for profit of such composition on defendant's said premises, and the defendant threatens to continue such infringing performances.

16. Upon information and belief, that the said performance of such composition was given on said premises under the direction of the defendant and for the entertainment and amusement of the patrons attending said premises, and for the purpose of attracting the public to patronize said premises, and for the purpose of profit, and the defendant has realized large profits and income from such infringing performances.

17. That the said wrongful acts of the defendant have caused and are causing great injury and damage to the plaintiffs which damage cannot be accurately computed, and unless this Court restrains the defendant from the further commission of said acts, the plaintiffs will suffer irreparable injury, for all of which the plaintiffs are without any adequate remedy at law.



Second Count

18. For a second cause of action against the defendant, the plaintiffs allege all of the facts set forth in paragraphs 1 to 7 hereof, but for the sake of brevity, such allegations are not repeated but are adopted by reference.

19. That prior to the 9th day of April, 1936, Arthur Freed, a citizen of the United States, originated, devised, created and wrote the words and lyrics of a new and original musical composition, and that also prior to the said date Nacio Herb Brown, a citizen of the United States, composed and set original music to the said words and lyrics, and the said words and lyrics, together with the said music, constituted a musical composition, entitled "Would you". [6]

20. That prior to the 9th day of April, 1936, the said author and composer assigned such composition to Robbins Music Corporation, (hereinafter in this count referred to as "the Publisher"), including all rights therein, and the right to secure copyright therein.

21. That thereafter and on the 9th day of April, 1936, the Publisher duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright MCMXXXVI, By Robbins Music Corporation, New York, New York."

22. That after publication of such composition with such notices of copyright, the said Publisher

promptly, on the 10th day of April, 1936, deposited in the office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, accompanied by a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work, and said work was duly registered by the said Register of Copyrights, who thereupon issued certificate of copyright registration therefor as Class E., Pub. No. 54613; that a full, true and correct copy of said certificate is attached hereto, marked "Exhibit B", and by this reference made a part hereof.

23. That since the date hereinabove mentioned in the paragraph next preceding of this count, such composition has been published by the Publisher. That upon each copy of such composition so published, there has been inscribed on the first page of the music the copyright notice required by law, in the words and figures set forth hereinabove.

24. That the Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in paragraph 19 of this count, and all the rights secured under such copyright, except as to the right assigned to the Society as set forth in paragraphs 6 and 7 hereof; that the Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in said paragraphs, up to and including the 1st day of January, 1941, and that by virtue of such assign-



ment the Publisher holds in trust for the Society, the [7] exclusive non-dramatic performing rights of said musical composition secured by said copyright down to and including the 1st day of January, 1941.

25. Upon information and belief, that the defendant, on or about the 30th day of November, 1936, and at other times, prior and subsequent thereto, without the knowledge or consent of the Society, or of the Publisher, and in infringement of such copyright, and with full knowledge of the Society's rights in such work and of such copyright belonging to the Publisher, gave public performances and rendition for profit of such composition on defendant's said premises, and the defendant threatens to continue such infringing performances.

26. Upon information and belief, that the said performance of such composition was given on said premises under the direction of the defendant and for the entertainment and amusement of the patrons attending said premises, and for the purpose of profit, and the defendant has realized large profits and income from such infringing performances.

27. That the said wrongful acts of the defendant have caused and are causing great injury and damage to the plaintiffs which damage cannot be accurately computed, and unless this Court restrains the defendant from the further commission of said acts, the plaintiffs will suffer irreparable injury, for all of which the plaintiffs are without any adequate remedy at law.

## Third Count

28. For a third cause of action against the defendant, the plaintiffs allege all of the facts set forth in paragraphs 1 to 7 hereof, but for the sake of brevity, such allegations are not repeated but are adopted by reference.

29. That prior to the 7th day of July, 1936, Walter Bullock, a citizen of the United States, composed and set original music to the said words and lyrics, and the said words and lyrics, together with the said music, constituted a musical composition, entitled "When Did You Leave Heaven".

30. That prior to the 7th day of July, 1936, the said author and composer assigned such compositions to Robbins Music Corporation (hereinafter in this count referred to as "the Publisher"), including all rights therein, and the right to secure copyright therein.

31. That thereafter and on the 7th day of July, 1936, the Publisher [8] duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright MCMXXXVI, By Robbins Music Corporation, New York, New York".

32. That after publication of such composition with such notices of copyright, the said Publisher promptly, on the 8th day of July, 1936, deposited in the office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, accompanied by

a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work, and said work was duly registered by the said Register of Copyrights, who thereupon issued certificate of copyright registration therefor as Class E., Pub. No. 56245; that a full, true and correct copy of said certificate is attached hereto, marked "Exhibit C", and by this reference made a part hereof.

33. That since the date hereinabove mentioned in the paragraph next preceding of this count, such composition has been published by the Publisher. That upon each copy of such composition so published, there has been inscribed on the first page of the music the copyright notice required by law, in the words and figures set forth hereinabove.

34. That the Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in paragraph 29 of this count, and all the rights secured under such copyright, except as to the right assigned to the Society as set forth in paragraphs 6 and 7 hereof; that the Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in said paragraphs, up to and including the 1st day of January, 1941, and that by virtue of such assignment the Publisher holds in trust for the Society, the exclusive non-dramatic performing rights of said musical composition secured by said copyright down to and including the 1st day of January, 1941.



35. Upon information and belief, that the defendant, on November 30, 1936, and at other times prior to and subsequent thereto, without the knowledge of the Society's rights in such work and of such copyright belonging to the Publisher, gave public performances and rendition for profit of such composition on defendant's said premises, and the defendant threatens to [9] continue such infringing performances.

36. Upon information and belief, that the said performance of such composition was given on said premises under the direction of the defendant and for the entertainment and amusement of the patrons attending said premises, and for the purpose of attracting the public to patronize said premises, and for the purpose of profit, and the defendant has realized large profits and income from such infringing performances.

37. That the said wrongful acts of the defendant have caused and are causing great injury and damage to the plaintiffs which damage cannot be accurately computed, and unless this Court restrains the defendant from the further commission of said acts, the plaintiffs will suffer irreparable injury, for all of which the plaintiffs are without any adequate remedy at law.

#### Fourth Count

38. For a fourth cause of action against the defendant, the plaintiffs allege all of the facts set forth in paragraphs 1 to 7 hereof, but for the sake

of brevity, such allegations are not repeated but are adopted by reference.

39. That prior to the 30th day of September, 1936, Cole Porter, a citizen of the United States, originated, devised, created and wrote the words and lyrics of a new and original musical composition, and that also prior to the said date Cole Porter, a citizen of the United States, composed, and set original music to the said words and lyrics, and the said words and lyrics, together with the said music, constituted a musical composition, entitled "It's D'Lovely".

40. That prior to the 30th day of September, 1936, the said author and composer assigned such composition to Chappell & Co., Inc., (hereinafter in this count referred to as "the Publisher"), including all rights therein, and the right to secure copyright therein.

41. That thereafter and on the 30th day of September, 1936, the Publisher duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright MCMXXXVI, By Chappell & Co., [10] Inc., New York, New York."

42. That after publication of such composition with such notices of copyright, the said Publisher promptly, on the 2nd day of October, 1936, deposited in the office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, accompanied

by a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work, and said work was duly registered by the said Register of Copyrights, who thereupon issued certificate of copyright registration therefor as Class E., Pub. No. 57754; that a full, true and correct copy of said certificate is attached hereto, marked "Exhibit D", and by this reference made a part hereof.

44. That the Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in paragraph 39 of this count, and all the rights secured under such copyright, except as to the right assigned to the Society as set forth in paragraphs 6 and 7 hereof; that the Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in said paragraphs, up to and including the 1st day of January, 1941, and that by virtue of such assignment the Publisher holds in trust for the Society, the exclusive non-dramatic performing rights of said musical composition secured by said copyright down to and including the 1st day of January, 1941.

45. Upon information and belief, that the defendant, on November 30, 1936, and at other times prior to and subsequent thereto, without the knowledge or consent of the Society, or of the Publisher, and in infringement of such copyright, and with full knowledge of the Society's rights in such work and of such copyright belonging to the Publisher, gave



public performances and rendition for profit of such composition on defendant's said premises, and the defendant threatens to continue such infringing performances.

46. Upon information and belief, that the said performance of such composition was given on said premises under the direction of the defendant and for the purpose of attracting the public to patronize said premises, and for the purpose of profit, and the defendant has realized large profits [11] and income from such infringing performances.

47. That the said wrongful acts of the defendant have caused and are causing great injury and damage to the plaintiffs which damage cannot be accurately computed, and unless this Court restrains the defendant from the further commission of said acts, the plaintiffs will suffer irreparable injury, for all of which the plaintiffs are without any adequate remedy at law.

#### Fifth Count

48. For a fifth cause of action against the defendant, the plaintiffs allege all of the facts set forth in paragraphs 1 to 7 hereof, but for the sake of brevity, such allegations are not repeated but are adopted by reference.

49. That prior to the 24th day of July, 1936, Dave Oppenheim, Michael H. Cleary and Jacques Krakeur, II, citizens of the United States, originated, devised, created and wrote the words and lyrics of a new and original musical composition,

and that also prior to the said date Dave Oppenheim, Michael H. Cleary and Jacques Krakeur, II, citizens of the United States, composed and set original music to the said words and lyrics, and the said words and lyrics, together with the said music, constituted a musical composition, entitled "When a Lady Meets a Gentleman Down South".

50. That prior to the 24th day of July, 1936, the said authors and composers assigned such composition to Popular Melodies, Inc. (hereinafter in this count referred to as "the Publisher"), including all rights therein, and the right to secure copyright therein.

51. That thereafter and on the 24th day of July, 1936, the Publisher duly copyrighted such composition by publishing the same and offering the same to the general public with the following notice of copyright on the first page of music, to-wit: "Copyright MCMXXXVI, By Popular Melodies, Inc., New York, New York." [12]

52. That after publication of such composition with such notices of copyright, the said Publisher promptly, on the 28th day of July, 1936, deposited in the office of the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, accompanied by a claim of copyright, and paid to the Register of Copyrights the fee required by law for the registration of the said work, and said work was duly registered by the said Register of Copyrights, who thereupon issued certificate of copyright registra-



tion therefor as Class E., Pub. No. 56599; that a full, true and correct copy of said certificate is attached hereto, marked "Exhibit E", and by this reference made a part hereof.

53. That since the date hereinabove mentioned in the paragraph next preceding of this count, such composition has been published by the Publisher. That upon each copy of such composition so published, there has been inscribed on the first page of the music the copyright notice required by law, in the words and figures set forth hereinabove.

54. That the Publisher is now the proprietor of the copyright in and to the musical composition mentioned and described in paragraph 49 of this count, and all the rights secured under such copyright, except as to the right assigned to the Society as set forth in paragraphs 6 and 7 hereof; that the Society is now the owner of the exclusive non-dramatic performing rights of such musical composition, pursuant to the assignment mentioned in said paragraphs, up to and including the 1st day of January, 1941, and that by virtue of such assignment the Publisher holds in trust for the Society, the exclusive non-dramatic performing rights of said musical composition secured by said copyright down to and including the 1st day of January, 1941.

55. Upon information and belief, that the defendant, on November 30, 1936, and at other times prior to and subsequent thereto, without the knowledge or consent of the Society, or of the Publisher,

and in infringement of such copyright, and with full knowledge of the Society's rights in such work and of such copyright belonging to the Publisher, gave public performances and rendition for profit of such composition on defendant's said premises, and the defendant threatens to continue such infringing performances. [13]

56. Upon information and belief, that the said performance of such composition was given on said premises under the direction of the defendant and for the entertainment and amusement of the patrons attending said premises, and for the purpose of attracting the public to patronize said premises, and for the purpose of profit, and the defendant has realized large profits and income from such infringing performances.

57. That the said wrongful acts of the defendant have caused and are causing great injury and damage to the plaintiffs which damage cannot be accurately computed, and unless this Court restrains the defendant from the further commission of said acts, the plaintiffs will suffer irreparable injury, for all of which the plaintiffs are without any adequate remedy at law.

Wherefore, plaintiffs pray

(1) That this Court direct the defendant to answer this Bill of Complaint;

(2) That upon the filing and presentation of this Bill of Complaint, and of additional proof by Affidavits, an Order to show cause be issued forthwith, directed to said defendant, returnable at such

time and place as may be fixed by the Court, requiring said defendant to show cause, if any it had, why a preliminary injunction should not issue pendente lite, and that upon such hearing to show cause, the said defendant and all persons acting under the direction, control, permission or license of the defendant be enjoined and restrained from publicly performing each and every one of the musical compositions hereinbefore enumerated, and from causing or permitting the said compositions to be publicly performed in the defendant's premises, or in any place owned, controlled or conducted by the defendant, and from aiding or abetting the public performance of such compositions in any such place or otherwise, and ordering that pending the said hearing to show cause and the determination thereof, and the entry of an Order thereon, the defendant and all persons acting under the direction, control,



permission, or license of the defendant, be enjoined and restrained from publicly performing each and every one of the musical compositions hereinbefore enumerated, and from causing or permitting the said compositions to be performed in the [14] defendant's premises, or in any place owned, controlled or conducted by the defendant, and from aiding or abetting the public performance of such compositions in any such place or otherwise;

(3) That upon final hearing a perpetual injunction be granted enjoining and restraining defendant and all persons acting under the direction, control, permission or license of the defendant from publicly performing each and every one of the hereinbefore enumerated compositions, and from causing or permitting the said compositions to be publicly performed in the defendant's premises, or in any place owned, controlled or conducted by the defendant, and from aiding or abetting the public performance of such compositions in any such place or otherwise;

(4) That the defendant be decreed to pay such damages as may have been sustained by plaintiffs in consequence of defendant's said unlawful acts, but in no event not less than Two Hundred Fifty and No/100 (\$250.00) Dollars apiece on each count herein;

(5) That the defendant be decreed to pay the costs of this action, and that a reasonable attorneys' fee be allowed; and

(6) For such other and further relief as to the Court may seem just and equitable in the premises.

GENE BUCK, as President of  
the American Society of Com-  
posers, Authors and Publishers,  
By HERMAN D. KENIN

Attorney

ROBBINS MUSIC CORPORA-  
TION

By HERMAN D. KENIN

Attorney

CHAPPELL & CO. INC.

By HERMAN D. KENIN

Attorney

POPULAR MELODIES, INC.

By HERMAN D. KENIN

Attorney

H. W. HAUGLAND

HERMAN D. KENIN

CLIFFORD S. O'BRIEN

Solicitors for Plaintiffs

Office and Post Office Address:

903 Artic Building

Seattle, Washington [15]

City, County and State of New York.—ss.

Gene Buck, being duly sworn, deposes and says that he is the President of the American Society of Composers, Authors and Publishers, one of the plaintiffs herein; that he has read the foregoing Bill of Complaint and knows the contents thereof,

and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the plaintiff is because the said plaintiff is an unincorporated association, and deponent an officer thereof, to wit: its President.

GENE BUCK

Sworn to before me this 21st day of December, 1936.

[Seal]

GERTRUDE W. PEARL

Notary Public, Kings County Clerk's No. 122. N. Y.  
County Clerk's No. 320.

Commission expires March 30, 1938.

City, County and State of New York—ss.

J. J. Bregman being duly sworn, deposes and says, that he is the Sec'y of Robbins Music Corporation, one of the plaintiffs herein, that he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the plaintiff is because the said plaintiff is a domestic corpora-

tion and deponent an officer thereof, to wit: its Secy.

J. J. BREGMAN

Sworn to before me this 21 day of December, 1936.

[Seal]

GERTRUDE W. PEARL

Notary Public, Kings County Clerk's No. 122. N. Y.  
County Clerk's No. 320.

Commission expires March 30, 1938. [16]

City, County & State of New York—ss.

Henry M. Spitzer being duly sworn, deposes and says, that he is the President of Chappell & Co. Inc. one of the plaintiffs herein; that he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the plaintiff is because the said plaintiff is a domestic corporation and deponent an officer thereof, to wit: its President.

HENRY M. SPITZER

Sworn to before me this 30 day of December, 1936.

[Seal]

E. J. BRECHLIN

Notary Public, N. Y. Co. Clks. No. 1012, Reg. No. 83594. Queen County Clerk's No. 2487.

Commission expires March 30, 1938.



City, County & State of New York—ss.

Norman Collyer being duly sworn, deposes and says that he is the Secretary of Popular Melodies, Inc., one of the plaintiffs herein; that he has read the foregoing Bill of Complaint and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

Deponent further says that the reason this verification is made by deponent and not by the plaintiff is because the said plaintiff is a domestic corporation and deponent an officer thereof, to-wit: its Secretary.

NORMAN COLLYER.

Sworn to before me this 6th day of January, 1937.

[Seal]

ANNA D. GHERSAN

Notary Public, Queens County. Queens County Clerk's No. 534, Queen County Register's No. 4232. Certified in New York County. New York County Clerk's No. 125. New York County Register's No. 7G64.

Commission expires Mar. 30, 1937. [17]

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## EXHIBIT A

Copyright office of the United States of America  
Library of Congress, Washington

## CERTIFICATE OF COPYRIGHT REGISTRATION.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts re-



specting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Robbins Music Corporation, New York, New York.

Title of Music: "Lovely Lady"

Words and music by Ted Koehler and Jimmy McHugh of the United States.

Date of publication December 9, 1935. Copies received December 10, 1935.

Entry: Class E., Pub., No. 52007

Signed

[Seal]

WILLIAM L. BROWN

Acting Register of Copyrights. [18]

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## EXHIBIT B

Copyright office of the United States of America  
Library of Congress, Washington

### CERTIFICATE OF COPYRIGHT REGISTRATION.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that

Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Robbins Music Corporation, New York, N. Y.

Title of Music: "Would You"

Words and music by Arthur Freed and Nacio Herb Brown of the United States.

Date of publication Apr. 9, 1936. Copies received Apr. 10, 1936.

Entry: Class E., Pub., No. 54613

Signed

[Seal]

WILLIAM L. BROWN

Acting Register of Copyrights [19]

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### EXHIBIT C

Copyright Office of the United States of America  
Library of Congress, Washington

### CERTIFICATE OF COPYRIGHT REGISTRATION.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of

a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Robbins Music Corp., New York, N. Y.

Title of Music: "When Did You Leave Heaven"

Words and music by Walter Bullock and Richard A. Whiting of the United States.

Date of publication July 7, 1936. Copies received July 8, 1936.

Entry: Class E., Pub., No. 56245

Signed

[Seal]

WILLIAM L. BROWN

Acting Register of Copyrights [20]

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EXHIBIT D

Copyright Office of the United States of America  
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT REGISTRATION.

This is to certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition

has been duly made in the name of Chappell & Co., Inc. New York, N. Y.

Title of Music: "It's D'Lovely"

Words and music by Cole Porter of the United States.

Date of publication Sept. 30, 1936. Copies received Oct. 2, 1936.

Entry: Class E., Pub., No. 57754

Signed

[Seal]

WILLIAM L. BROWN

Acting Register of Copyrights. [21]

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### EXHIBIT E

Copyright Office of the United States of America  
Library of Congress, Washington

### CERTIFICATE OF COPYRIGHT REGISTRATION.

This Is to Certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Popular Melodies, Inc., New York, N. Y.

Title of Music: "When a Lady Meets a Gentleman Down South".

Words and music by Dave Oppenheim, Michael



H. Cleary and Jacques Krakeur II of the United States.

Date of publication, July 24, 1936. Copies received July 28, 1936.

Entry: Class E., Pub. No. 56599

Signed

[Seal] WILLIAM L. BROWN,  
Acting Register of Copyrights.

[Endorsed]: Filed Jan. 16, 1937. [22]

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[Title of District Court and Cause.]

AMENDED ANSWERS AND  
CROSS COMPLAINT

Comes now the Defendant and by leave of the Court first had and obtained files herein its amended answers and amended cross complaint and therein admits, denies and alleges as follows:

I.

Answering Paragraph I, Defendant admits that the American Society of Composers, Authors and Publishers (hereinafter for brevity's sake referred to as the "Society") is an unincorporated Association of over 700 members, and is comprised of Composers, Authors and Publishers of Music, with its principal place of business in the City of New York, State of New York, and deny each and every other allegation in said paragraph.

## II.

Answering Paragraph II, defendant admits that the issues and questions involved are of common interest to all members of said Society, and deny each and every allegation contained in said paragraph.

## III.

Answering Paragraph III, defendant admits that each of the plaintiffs described as a corporation, are engaged in the business of printing, publishing and vending of copyrighted musical works, but deny each and every other allegation in said paragraph.

[23]

## IV.

Answering Paragraph IV, defendant admits the allegations in said paragraph.

## V.

Answering Paragraph V, defendant admits the allegation therein contained.

## VI.

Answering Paragraph VI, defendant admits all of said paragraph save and excepting that defendant denies that the plaintiffs herein have causes of action against the defendant.

## VII.

Answering Paragraph VII, defendant admits that the Society is the sole and exclusive owner of the dramatic public performing rights in and to each

and all of the copyrighted musical compositions mentioned in the plaintiff's complaint, and that each of the corporate plaintiffs are members of the Society, but deny each and every other allegation in said paragraph.

### VIII.

Answering the First to Fifth counts inclusive, defendant admits that the Society is owner of the public performing rights of the musical compositions mentioned in said counts, and defendant alleges that he has no knowledge as to whether the various musical compositions were rendered in the defendant's place of business on the dates mentioned, or at all, and therefore deny that said musical compositions were unlawfully rendered, and defendant denies each and every other allegation in said counts, one to five, inclusive.

And for a Further and Separate Answer and Defense, and by way of cross-complaint, against the plaintiffs, defendant complains and alleges as follows:

### XXXVIII.

That on the 1st day of July, 1927, the defendants, acting [24] under duress, business compulsion and in fear of being forced out of business, executed a contract with plaintiff Society, wherein and whereby the society granted the defendant the right to publicly perform all musical compositions controlled by plaintiffs; that said contract has never been canceled and is now in effect; that at the time of entering into said contract this defendant knew that plaintiff

society was a rich and powerful combine acting in violation of the Anti-Trust laws of the United States and of the State of Washington; and the defendant entered into said contract only because defendant was coerced into so doing by threats of costly litigation which defendant could not afford even though defendant should successfully defend suits brought by said society, and because it was less expensive to pay tribute to the unlawful combine (said society) than to fight numerous law suits.

[Endorsed]: Filed Mar. 30, 1937. [25]

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[Title of District Court and Cause.]

ORDER STRIKING AFFIRMATIVE  
DEFENSE

This matter coming regularly before the court upon the motion of the plaintiffs to strike from the answer on file herein all of the separate answer and cross-complaint, excepting Paragraph XXXVIII thereof, and the matter having been set before the court for argument, and the plaintiffs having appeared by H. W. Haugland, of counsel, and the defendant having appeared by Messrs. Pomeroy, Belknap and Heiman, of its counsel, and argument having been had, and the matter being taken under advisement, and briefs having been filed by both sides, and the court having fully considered the matter and being fully advised in the facts and premises, and having heretofore, to-wit, on January 19,



1938, filed his Memorandum Opinion, and it regularly appearing that due notice has been given of the presentation of the within order, and it appearing to the court that all of the matters appearing in the said affirmative defense contained in the answer on file herein are not well pleaded for the reason and on the grounds that the matters therein contained are insufficient to constitute a defense or to constitute any defensive matter in a suit for infringement, now, therefore, it [26] is here and now

Ordered, Adjudged and Decreed that all of the separate answer and cross-complaint, being Paragraphs I to LXXIII, excepting Paragraph XXXVIII, be, and the same is hereby, stricken, to which order the defendant excepts and its exception is hereby allowed.

Done in Open Court this 25th day of January, 1938.

JOHN C. BOWEN,  
Judge.

Presented by:

B. H. CAMPERSON,  
Of Counsel for Plaintiffs.

Approved as to form:

CLARK R. BELKNAP,  
Atty. for Def.

HAMMER & POMEROY,  
Attys. for Def.

O.k. as to form:

JEFFREY HEIMAN.

[Endorsed]: Filed Jan. 25, 1938. [27]

[Title of District Court and Cause.]

REPLY.

Comes now the Plaintiffs and replying to Amended Answer and Cross-Complaint on file herein, denies and alleges:

I.

Replying to Paragraph XXXVIII of the Cross-Complaint Plaintiffs deny each and every allegation therein contained and the whole thereof.

Wherefore, having fully replied, Plaintiffs pray for judgment as in the prayer of their complaint contained.

H. W. HAUGLAND

Attorney for Plaintiffs.

[Endorsed]: Filed Oct. 14, 1938. [28]

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[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby Stipulated and Agreed, by and between the attorneys for the respective parties hereto, that the above entitled cause may be submitted upon the following agreed facts, provided, however, that each of the parties expressly reserves the right to introduce evidence relating to the allegations that defendant gave the performances of the musical compositions described in the complaint herein:

1. The above named defendant owned, controlled, managed and operated, and still owns, con-

trols, manages and operates a certain place of business for public entertainment, accommodation, and amusement, known as Trianon Ballroom, located at 218 Wall Street, Seattle, Washington, in this District.

2. The parties hereto expressly refer to the Stipulation of Facts entered in Equity Cause No. 1170, being the case brought by Gene Buck, et alles, against W. L. Scribner, defendant, in the United States District Court, Western District of Washington, Northern Division, and hereby ratify and approve the Stipulations [29] of Fact filed in the said cause number, and adopt the following paragraph numbers in their entirety as the proper stipulation of facts to be entered in this cause: 1, 2, 3, 5 and 6; and further and expressly stipulate that the exhibits referred to in Paragraph 7 are identical in form and are the same agreements entered into between the parties in the instant suit; and further expressly stipulate that with respect to the paragraphs numbered 8 to 43, inclusive, the same shall represent the form of the stipulation entered into between the parties hereto, excepting that the names of the songs and the names of the composers shall be as in the instant case.

3. It is further expressly stipulated between the parties that all of the facts pleaded in the First Count, being Paragraphs 8 to 14, inclusive, of the complaint on file herein, are admitted and accepted as facts without any further or other proof being offered.

4. It is further expressly stipulated between the parties that all of the facts pleaded in the Second Count, being Paragraphs 18 to 24, inclusive, of the complaint on file herein, are admitted and accepted as facts without any further or other proof being offered.

5. It is further expressly stipulated between the parties that all of the facts pleaded in the Third Count, being Paragraphs 28 to 34, inclusive, of the complaint on file herein, are admitted and accepted as facts without any further or other proof being offered.

6. It is further expressly stipulated between the parties that all of the facts pleaded in the Fourth Count, being Paragraphs 38 to 44, inclusive, of the complaint on file herein, are admitted and accepted as facts without any further or other proof being offered. [30]

7. It is further expressly stipulated between the parties that all of the facts pleaded in the Fifth Count, being Paragraphs 48 to 54, inclusive, of the complaint on file herein, are admitted and accepted as facts without any further or other proof being offered.

Dated at Seattle, Washington, this 3rd day of August, 1938.

H. W. HAUGLAND

Attorneys for Plaintiffs

CLARK R. BELKNAP

Attorneys for Defendants

[Endorsed]: Filed Oct. 14, 1938. [31]



[Title of District Court and Cause.]

NARRATIVE STATEMENT OF EVIDENCE  
(Testimony)

Be It Remembered that the above entitled causes came on for trial on the merits in the Court Room of the above entitled court at Tacoma, Washington, at 10:00 o'clock in the forenoon on October 14th, 1938, before the Honorable Edward E. Cushman, United States District Judge, one of the judges of said Court.

Plaintiffs in all cases were represented by H. W. Haugland of Seattle, Washington, and Herman D. Kenin, of Portland, Oregon;

Defendants in all cases were represented by Clark R. Belknap of Seattle, Washington, one of the attorneys of record in such cases, and

The following proceedings were had:

The Court:

You are proceeding with the understanding that in all five cases the hearing today will be supplemented with depositions? A deposition taken of one witness by plaintiff in each of these cases, is that it?  
Mr. Haugland:

In each of the three cases, yes. The Trianon case, No. 1162, the Lockhart case, No. 1171, and the Tarry Inn case, No. 1172. We will proceed with the Trianon case first, No. 1162. I am filing Plaintiffs' Reply to the Affirmative Allegation in the Amended Answer and a Stipulation of Fact. I would like to file these copies of the certificates of ownership, which counsel has stipulated belong to the plaintiffs.

Copy of certificate of Acting Register of Copyrights issued to Robbins Music Corp., New York City, covering music entitled "Lovely Lady" was then admitted in evidence, without objection, and marked "Plaintiffs' Exhibit #1."

### PLAINTIFF'S EXHIBIT No. 1

Copyright Office of the United States of America  
Library of Congress, Washington

### CERTIFICATE OF COPYRIGHT REGISTRATION

This Is To Certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Robbins Music Corporation, New York, New York.

—Copy—

Robbins Music Corp. New York, N. Y.

Title of Music: "Lovely Lady" .

Lyric by Ted Koehler

Music by Jimmy McHugh of the United States

Date of publication December 9, 1935. Copies received December 10, 1935.

Entry: Class E., Pub., No. 52007.

[Seal]      Signed WILLIAM L. BROWN  
Acting Register of Copyrights.

[Endorsed]: Pltfs. Ex. #1 Adm. [92]

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Copy of certificate of Acting Register of Copyrights issued to Robbins Music Corp., New York City, covering music entitled "Would You", was then admitted [33] in evidence, without objection, and marked "Plaintiffs' Exhibit #2."

PLAINTIFF'S EXHIBIT No. 2

Copyright Office of the United States of America  
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT  
REGISTRATION

This Is To Certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Robbins Music Corporation, New York, N. Y.

—Copy—

Robbins Music Corp.

New York, N. Y.

Title of Music: "Would You"

Lyric by Arthur Freed and music by Nacio Herb Brown of the United States, from the picture San Francisco.

Date of publication Apr. 9, 1936. Copies received Apr. 10, 1936.

Entry: Class E., Pub., No. 54613.

[Seal] Signed WILLIAM L. BROWN

Acting Register of Copyrights.

[Endorsed]: Pltffs. Ex. #2 Adm. [93]

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Copy of certificate of Acting Register of Copyrights issued to Robbins Music Corp., New York City, covering music entitled "When Did You Leave Heaven" was then admitted in evidence, without objection, and marked "Plaintiffs' Exhibit #3."

## PLAINTIFF'S EXHIBIT No. 3

E1

—Copy—

Copyright Office of the United States of America  
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT  
REGISTRATION

This Is To Certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts re-



specting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Robbins Music Corp., New York, N. Y.

Title of Music: When Did You Leave Heaven. From Sing Baby Sing. Lyric by Walter Bullock and music by Richard A. Whiting of the United States.

Date of publication July 7, 1936. Copies received July 8, 1936.

Entry: Class E., Pub., No. 56245.

[Seal] Signed WILLIAM L. BROWN

Acting Register of Copyrights.

[Endorsed]: Pltfs. Ex. #3 Adm. [94]

Copy of certificate of Acting Register of Copyrights issued to Chappell & Co., Inc., New York, N. Y., covering music entitled "It's D'Lovely", was then admitted in evidence, without objection, and marked "Plaintiff's Exhibit #4."

PLAINTIFF'S EXHIBIT No. 4

Copyright Office of the United States of America  
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT  
REGISTRATION

This Is To Certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composition has been duly made in the name of Chappell & Co., Inc., New York, N. Y.

—Copy—

Chappell & Co., Inc.

New York, N. Y.

Title of Music: "It's D'Lovely"

Words and music by Cole Porter of the United States from Red Hot and Blue.

Date of publication Sept. 30, 1936. Copies received Oct. 2, 1936.

Entry: Class E., Pub., No. 57754.

[Seal]      Signed WILLIAM L. BROWN  
Acting Register of Copyrights.

[Endorsed]: Pltfs. Ex. #4 Adm. [96]

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Copy of certificate of Acting Register of Copyrights issued to Popular Melodies Inc., New York, N. Y., covering music entitled "When a Lady Meets a Gentleman Down South", was then admitted in evidence, and marked "Plaintiffs' Exhibit #5."

PLAINTIFF'S EXHIBIT No. 5

E1

—Copy—

Copyright Office of the United States of America  
Library of Congress, Washington

CERTIFICATE OF COPYRIGHT  
REGISTRATION

This is to Certify, in conformity with section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that Two copies of the Musical Composition named herein have been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years from the date of publication of said composi-

tion has been duly made in the name of Popular Melodies Inc., New York, N. Y.

Title of Music: When a Lady Meets a Gentleman Down South. Words and music by Dave Oppenheim, Michael H. Cleary and Jacques Krakeur II of the United States.

Date of publication July 24, 1936. Copies received July 28, 1936.

Entry: Class E., Pub., No. 56599.

[Seal] Signed WILLIAM L. BROWN

Acting Register of Copyrights.

[Endorsed]: Pltfs. Ex. #5 Adm. [97]

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### ELIOT WRIGHT

produced as a witness on behalf of Plaintiffs, after being duly sworn, was examined and testified as follows:

#### Direct Examination

I am a musician and have been for thirteen years. I studied music at the University of Oregon and prior to that was a professional trombone player. Since that I have been a professional pianist in various theatres and dance orchestras.

In November, 1936, I was employed by Mr. Kenin to visit various establishments that were using music played by orchestras and take down the names of the tunes they were playing. On November 30th, 1936, I visited the Trianon Ballroom in Seattle. I paid an admission fee of thirty-five cents



(Testimony of Eliot Wright.)

and found there about five hundred persons. There was an eleven piece orchestra playing during the time I was there. Plaintiffs' Exhibit #6 is a list I made of songs played while I was present in the Trianon Ballroom. They played all of the pieces listed there.

The document referred to, Report of the Trianon Ballroom, by Eliot Wright, was then admitted in evidence without objection, as Plaintiffs' Exhibit #6. [34]

### PLAINTIFF'S EXHIBIT No. 6

Establishment: Trianon Ballroom.

Address—218 Wall Street.

City—Seattle, Washington.

Date—November 30, 1936.

Time Entered—11:37 P. M.

Proprietor ( )—John Savage.

Time Left—12:10 A. M.

| Title of Song & How Rendered |                              | Number of<br>Verses & Choruses | Time<br>Played |
|------------------------------|------------------------------|--------------------------------|----------------|
| 1. Title                     | Lovely Lady                  | 1 C.                           | 11:41          |
|                              | How Rendered                 | Band                           |                |
| 2. Title                     | When I grow too old to Dream | 1 C.                           | 11:44          |
|                              | How Rendered                 | Band                           |                |
| 3. Title                     | Would You                    | 2 C.                           | 11:46          |
|                              | How Rendered                 | Band                           |                |
| 4. Title                     | The Way you Look Tonight     | 1 C.                           | 11:50          |
|                              | How Rendered                 | Band                           |                |
| 5. Title                     | When did you Leave Heaven    | 1 C.                           | 11:53          |
|                              | How Rendered                 |                                |                |
|                              | Vocal by Margaret Sheaty     |                                |                |
|                              | (Armature)                   |                                |                |

## (Testimony of Eliot Wright.)

|     |                   |                                                    |       |       |
|-----|-------------------|----------------------------------------------------|-------|-------|
| 6.  | Title             | This is a Fine Romance                             | 1 C.  | 11:54 |
|     | How Rendered      | Band                                               |       |       |
| 7.  | Title             | Star Dust                                          | 1 C.  | 11:55 |
|     | How Rendered      |                                                    |       |       |
|     |                   | Trombone solo—band acc.                            |       |       |
| 8.  | Title             | When a Lady Meets a<br>Gentleman Down South        | 3 C.  | 11:57 |
|     | How Rendered      | 2 band cho—1 vocal<br>by Ruth Skinner              |       |       |
| 9.  | Title             | Alexanders Ragtime band                            | 3 C.  | 12:00 |
|     | How Rendered      | Band                                               |       |       |
| 10. | Title             | It's Delightful, It's Delicious,<br>It's De-Lovely | 3 C.  | 12:03 |
| 11. | Title             | I'm in a dancing Mood                              | 3 C.  | 12:06 |
|     | How Rendered      | Band                                               |       |       |
| 12. | Title.....        |                                                    | V. C. | _____ |
|     | How Rendered..... |                                                    |       |       |

Report Rendered by:

ELIOT WRIGHT

MAURICE MEVIWEATHER

Inspectors

Please report in ink. [99]

Of report is for Theatre, answer the following:

Seating capacity—

Admission—

1. Name of Picture  
Producer  
Titles of Songs  
How rendered
2. Name of Picture  
Producer  
Title of Songs  
How rendered

(Testimony of Eliot Wright.)

List all titles of songs played in Newsreels, trailers and advertisements. If newsreel, list producers of film and how tune was rendered. If trailer, advise picture it was announcing and how tunes were rendered. Also list tunes, if any, played on phonograph records before show and during intermission.

Additional Information on General Establishments:

Type of establishment (beer parlor, dance hall,  
nite club, etc.)

Dance Hall

Admission, minimum or couvert charge: 35¢ plus  
10¢ checking Fee.

Capacity: About 1400 people.

Name of orchestra: Nick Stewarts Orchestra.

Number of nites per week operated with music:  
don't know.

Names of soloists (vocalists): Ruth Skinner, Ollie  
Perrillo (Bass Player).

List of instruments in orchestra: Three brass,  
three Sax, Piano, drums, bass, guitar & Pipe  
Organ.

Remarks: Band is a Traveling Band with excep-  
tion of Trombonist Galen Gloyd, and Organist  
Tubby Clarke who are local men.

About 250 couples dancing—according to fellows  
in band this was a bad Monday night.

[Endorsed]: Pltfs. Ex.# 6 adm. [100]

(Testimony of Eliot Wright.)

Mr. Belknap:

If the Court please, just for shortening the record, the defendant will stipulate that in each of the respective instances involved in these suits, there was rendered the music alleged to have been rendered in their various complaints.

The Court: It will be so understood.

---

MAURICE MERIWETHER,

produced as a witness for the plaintiffs, was sworn and took the witness stand.

Mr. Belknap: His testimony will be the same and we will stipulate.

Mr. Haugland:

It is now our understanding that in each of the five cases it is stipulated by counsel that the numbers—musical selections alleged in our complaints were performed at the time and at the place alleged and that the institutions were places of public entertainment, and therefore they were public performances for profit of these numbers?

Mr. Belknap: Yes.

The Court: So understood.

Mr. Haugland: I am filing the stipulation of facts.

The Court:

These stipulations in each case admit the performance on the date alleged?



Mr. Belknap: Yes. [35]

Mr. Haugland:

In the Scribner case, being No. 1170, we prepared our original stipulation, to which we have attached the various exhibits referred to in that stipulation, and all other stipulations adopt and refer to these, although in addition to that they admit the allegations of certain paragraphs of the complaint. With that understanding, the plaintiff will rest in this case.

Mr. Belknap:

At this time the defendants in each of the five cases move to dismiss as to each and all of the corporate plaintiffs, because they allege in the complaints that the Society is the one that collects all costs and damages.

After argument, the Court ruled as follows:

The Court:

The motion is denied, with the reservation that when the court has had further opportunity to examine the pleadings the matter may be further heard or considered.

Mr. Belknap:

The defendants now move to dismiss as to the Society, for the reason that the only party who can maintain the suit is the owner of the entire copyright, and upon the additional ground that these suits and the Society's right to appear here are based upon an illegal contract.

The Court: Motion denied.

## JOHN E. SAVAGE,

produced as a witness for the defendant, in cause No. 1162, was sworn and testified as follows:

## Direct Examination

I am one of the managing officers of the Trianon Company, and have been since 1927, having had charge of its general management. [36]

In June or July, 1927, I took out a license with the American Society of Composers, Authors and Publishers for the Trianon. I have looked through my files, but am unable to locate the license. However, I remember we were to pay three hundred dollars a year under that license.

Mr. Haugland:

We object on the grounds that the license agreement will be the best evidence.

The Court:

Before ruling, you will be allowed to cross examine.

Mr. Savage (continuing):

Defendants Exhibit #1 is a series of checks, nine in number, which were given by the Trianon as payments on the license agreement testified to.

The checks in question (9) were then received in evidence without objection as "Defendant's Exhibit #1", each being in the amount of \$75 and payable to the American Society of Composers, Authors and Publishers,

(Testimony of John E. Savage.)

and drawn on the account of the Trianon Company.

DEFENDANT'S EXHIBIT NO. 1

The National Bank of Commerce  
of Seattle

Seattle, Washington, Oct. 23, 1934. No. 11627

Pay to the Order of Am. Society Composers  
Authors & Pub. \$75.00 Seventy-five no/100 Dollars.

THE TRIANON CO.,  
JOHN E. SAVAGE,

Pres.

TRA

(Endorsed on the back as follows)

Pay to the Order of the First National Bank,  
Portland, Oregon.

American Society of Composers, Authors and  
Publishers

Pay to the Order of Any Bank, Banker or Trust Co.

Prior Endorsements Guaranteed

The First National Bank

Oct. 29, 1934

Portland

24-4

Oregon

24-4

(Testimony of John E. Savage.)

19-3-12

The National Bank of Commerce  
of Seattle

Seattle, Washington, Mch. 15, 1930. No. 5325

Pay to the Order of American Society Comp.  
Authors & Pub. \$75.00

Seventy-five no/100 dollars

THE TRIANON CO.,

JOHN E. SAVAGE,

Pres.

(Endorsed on back as follows)

American Society of Composers, Authors and Pub-  
lishers.

Clark R. Belknap

Pay First Seattle Dexter Horton National Bank

262

Seattle, Wash. or Order

262

Clark R. Belknap

Received Payment Through Clearing House Asso-  
ciation of Seattle. (All Prior Endorsements Guar-  
anteed).

Mar. 19, 1930

First Seattle Dexter Horton National Bank

19-2

of Seattle

19-2

[131]



(Testimony of John E. Savage.)

The National Bank of Commerce  
of Seattle

19-3-12

Seattle, Washington, Dec. 26, 1929. No. 4932

Pay to the Order of Am Society Comp & Authors  
\$75.00.

Seventy-five no/100 dollars.

THE TRIANON CO.,  
JOHN E. SAVAGE,

Pres.

(Endorsed on back as follows)

American Society of Composers, Authors and  
Publishers

Clark R. Belknap

Pay First Seattle Dexter Horton National Bank

262          Seattle, Wash. or Order          262

Clark R. Belknap

Received Payment Through Clearing House Asso-  
ciation of Seattle. (All Prior Endorsements Guar-  
anteed)

Dec. 30, 1929

First Seattle Dexter Horton National Bank

19-2                  of Seattle                  19-2

(Testimony of John E. Savage.)

19-20-12 No. 4155

The National City Bank of Seattle

Seattle, Washington, July 6, 1929

Pay to the order of American Society of Composers  
& Publishers \$75.00.

Seventy-five no/100 dollars

THE TRIANON CO.,

JOHN E. SAVAGE,

Pres.

(Endorsed on back as follows)

American Society of Composers, Authors and  
Publishers

Clark R. Belknap

Pay to the Dexter Horton Natl. Bank

2868

of Seattle or Order

2868

Clark R. Belknap

Received Payment Through Clearing House  
Ass'n of Seattle. All Prior Endorsements Guaranteed.

Jul. 10, 1929

The Dexter Horton Nat'l. Bank

19-4

of Seattle

19-4

Received Payment Through Clearing House Association of Seattle (All Prior Endorsements Established. D-H 1870.

Jul. 10, 1929

The Dexter Horton National Bank

19-4

of Seattle

19-4

(Testimony of John E. Savage.)

The National Bank of Commerce 19-3-12  
of Seattle

Seattle, Washington, Feb. 17, 1935. No. 12065

Pay to the Order of American Society of Compos-  
ers & Publishers \$75.00.

Seventy-five no/100 dollars

THE TRIANON CO.,

JOHN E. SAVAGE, Mgr.

(Endorsed on reverse side as follows)

American Society of Composers & Publishers

Pay to the Order of Any Bank, Banker or Trust  
Co. Prior Endorsements Guaranteed.

The First National Bank

Feb. 20, 1935

24-4

Portland,

24-4

Oregon.

Pay to the Order of the First National Bank

Portland, Oregon.

American Society of Composers, Authors and  
Publishers.

(Testimony of John E. Savage.)

The National Bank of Commerce 19-3-12  
of Seattle

Seattle, Washington, June 20, 1935. No. 12528

Pay to the Order of Am. Society of Composers  
& Publishers \$75.00.

Seventy-five no/100 dollars

THE TRIANON CO.,

JOHN E. SAVAGE, Mgr.

(Endorsed on reverse side as follows)

American Society of Composers

Pay First National Bank

681

Metropolitan Branch

681

Seattle, Wash., or order

American Society of Composers,

Authors & Publishers

Pay to the Order of Any Bank or Banker or  
through Clearing House Association of Seattle. All  
Prior Endorsements Guaranteed.

19-21

Jun 22, 1935

19-21

Metropolitan Branch

First National Bank of Seattle

Seattle, Wash.

Successor to

Metropolitan National Bank [133]



(Testimony of John E. Savage.)

The National Bank of Commerce 19-3-12  
of Seattle

Seattle, Washington, Mch. 10, 1934. No. 10766

Pay to the Order of Am. Society Comp. Authors  
& Pub. \$75.00.

Seventy-five no/100 dollars

THE TRIANON CO.,

JOHN E. SAVAGE, Mgr.

(Endorsed on the reverse side as follows)

Pay to the Order of Any Bank, Banker or Trust  
Co. Prior Endorsements Guaranteed.

The First National Bank

Mar. 10, 1934

24-4

Portland,

24-4

Oregon

T. T. Ashton, Cashier

[Endorsement Cancelled 24-4.]

Pay to the Order of Any Bank, Banker or Trust  
Co. Prior Endorsements Guaranteed.

The First National Bank

Mar. 13, 1934

Portland,

24-4

Oregon

24-4

Placed to the Credit of Within Named Payee.

Endorsement Guaranteed

The First National Bank of Portland, Oregon

(Testimony of John E. Savage.)

The National Bank of Commerce 19-3-12  
of Seattle

Seattle, Washington, May 29, 1934. No. 11078

Pay to the Order of Am. Society Comp. & Pub-  
lishers \$75.00.

Seventy-five no/100 dollars

THE TRIANON CO.,

JAMES E. SAVAGE, Mgr.

(Endorsed on reverse side as follows)

Pay to the Order of the First National Bank

4191                      Portland, Oregon.                      4191

American Society of Authors and Publishers

Pay to the Order of Any Bank, Banker or Trust  
Co. Prior Endorsements Guaranteed.

24-4                      The First National Bank                      24-4

May 31, 1934

T. T. Ashton, Cashier [134]

The National Bank of Commerce 19-3-12  
of Seattle

Seattle, Washington, Aug. 2nd, 1934. No. 11297

Pay to the Order of American Society Composers,  
Publishers \$75.00.

Seventy-five no/100 dollars

THE TRIANON CO.,

JOHN E. SAVAGE, Mgr.

(Testimony of John E. Savage.)

(Endorsed on reverse side as follows)

Pay to the Order of the First National Bank

4191                      Portland, Oregon                      4191

American Society of Authors and Publishers

Pay to the Order of Any Bank, Banker or Trust  
Co. Prior Endorsements Guaranteed.

The First National Bank

Aug. 4, 1934

24-4                      Portland,                      24-4  
Oregon

[Endorsed]: Defts. Ex. #1 adm. [135]

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### Cross Examination

About two weeks ago I looked through all our files for the license agreement. We have a filing system where we keep letters, invoices, receipts and everything of that kind.

We contend that we had a license that was in effect on November 30th, 1936. I don't know whether we made any payments to the society after June 20, 1935.

We have no correspondence file with the Society. I didn't look for any letters received from the Society, for I never saved letters. I save very few letters. I don't keep copies of the letters I write for I haven't a stenographer. I write most of my letters in longhand.

(Testimony of John E. Savage.)

I didn't claim on November 30, 1936, that I was operating [37] under a license because I have never been asked to make a claim.

I have had conversation with Mr. Kenin at different times. I discussed with Mr. Kenin the situation in the State of Washington at different times. During the time the State receivership was on they were not in the State, and after the decision in Olympia it looked very shady to me, and I discussed that with Mr. Kenin, and I discussed with him at that time that I thought if the company was to arrange a different set-up so they could do business in the State of Washington without being tied up on the monopoly charges they could do business. I was familiar with the broadcasting situation and the theaters and there was legislative matters coming up.

I didn't refuse to make any payments. He didn't ask me. I suggested that he get together and make rates for the State of Washington. I did not receive notice of cancellation of the license agreement.

I didn't keep any letters I received from Mr. Kenin. I think I had a couple of letters from him, but if I remember the contents of the letter I wrote him, it was along the line that I didn't think the company would be able to do business in the State of Washington under the present set-up.

I don't think I received any such letter (Plaintiffs' Exhibit #7). I knew Mr. Stanley personally and talked to him about these things a number of



(Testimony of John E. Savage.)

times. I told him I thought I should have an adjustment on that rate, and at no time was there ever any unfriendly relations or occasion for such letter.

Subsequently to July 1, 1935, I never made any payments to the Society. I knew that the State suit was dismissed in June of 1936.

I do not remember receiving a letter from the Society's representatives subsequent to July 1, 1935. I do not [38] know whether or not I received Plaintiffs' Exhibit #8, a letter dated December 1, 1936. I do remember I received a letter from Mr. Kenin. Plaintiffs' Exhibit #9 is written in my handwriting. After seeing that it refers to a letter of December 1, I will not say that I received Plaintiffs' Exhibit #8. Plaintiffs' Exhibit #9 is in my handwriting. I think I also wrote Mr. Kenin another letter. In my letter of December 7 I made no claim that I was operating under a license agreement. I said they should arrange a method of doing business in the state of Washington that was satisfactory. I think yet they will have to come to something of that kind before they can get along here. I remember getting the letter, Plaintiffs' Exhibit #10. I do not remember receiving Plaintiffs' Exhibit #12. There was nothing of importance in it anyhow. I might have received Plaintiffs' Exhibit #11, I can't say.

Plaintiffs' Exhibit #13 is in my handwriting. I received Plaintiffs' Exhibit #14. I did not fill out the application for a license contained in Plaintiffs' Exhibit #10 because I already had a license.

(Testimony of John E. Savage.)

Mr. Haugland:

I move the admission of all these exhibits, Plaintiffs' numbers 7, 8, 9, 10, 11, 12, 13, and 14.

Mr. Belknap:

We object to all copies. No notice was ever given to produce the originals.

The Court:

Nine, ten, thirteen and fourteen are admitted, and objection overruled.

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Plaintiffs' Exhibit #9, original letter from John Savage to Herman Kenin dated Dec. 7, 1936, was then admitted in evidence. [39]

#### PLAINTIFFS' EXHIBIT NO. 9

Hotel Butler,  
Seattle

Mr. Herman Kenin,  
Portland, Oregon,  
Dear Friend Henry:

Dec. 7th, 1936

Your letter of December 1st received, and in reply will say that it was my impression that the "Society" was a monopoly and that the constitution of Washington is so strong against monopolies that it is not allowed to do business in the State.

I was in Portland about six weeks ago and would have given you a visit had I known where to find you. May be down again soon in case a matter I have in mind requires another personal visit. Do you come up this way? In case you do, would be glad to see you again.

(Testimony of John E. Savage.)

Suppose the violin has been stored away for good.  
With best personal regards and good wishes, I am

Yours sincerely,

JOHN SAVAGE.

[Endorsed]: Pltfs. Ex. #9. Adm. [106]

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Plaintiffs' Exhibit #10, copy of letter from  
Herman D. Kenin to John Savage, dated Dec.  
8, 1936, was then admitted in evidence.

PLAINTIFFS' EXHIBIT NO. 10

Mr. John Savage,

December 8, 1936

c/o Trianon Ballroom,  
Seattle, Washington.

Dear John:

I have your letter of December 7th in answer to my letter to you of December 1st. It had been my impression that all music users in the State of Washington had been informed of the decision handed down by the Judge in the suit which you mention. Evidently you have not received such notice. I am enclosing herewith for your information a copy of the decree.

I was in Seattle the other day, but only for a few hours. We are proceeding to organize our business in the State of Washington, and our field men are sending us the names of selections being performed in the various establishments.

(Testimony of John E. Savage.)

The Society feels that it is performing a service when it permits you, as a music user, to take a license making available a copyright pool of music. If it were not for the Society or someone acting on behalf of the copyright owners, you would have a difficult time trying to find each copyright owner and then making your separate terms with him for use of his selection, and at the same time hazarding the possibility of infringing upon someone's copyrights.

I would appreciate it, after reading the copy enclosed, if you will fill out the application contained herein so that we may have a record of your operation, and so that a rate may be quoted you by the Rate Committee of ASCAP.

My violins have been in mothballs for several years now, but I didn't put them away soon enough, although it was a lot of fun while it lasted.

Hoping to see you real soon, and with all good wishes, I am

Sincerely,

HERMAN D. KENIN.

enc. decree

kdk d

[Endorsed]: Pltfs. Ex. #10 adm. [107]



(Testimony of John E. Savage.)

Plaintiffs' Exhibit #13, original letter from John Savage to Herman Kenin, dated Dec. 28th, then received in evidence.

PLAINTIFFS' EXHIBIT NO. 13

Hotel Butler,  
Seattle

Mr. Herman Kenin,  
Portland, Oregon.

Dec. 28th.

Dear Herman:

Should have written you sooner, but these holidays and other things caused me to postpone it.

In my investigations I have found a very much incensed ASCAP clientele. They figure the Attorney General's office and the receiver sold them out. That 7 or 8 thousand dollars in fees were involved besides a trip to Hollywood and possibly other emoluments, out of which the AG's office received \$3,500.00 and possibly a share of the other. The decision of Wright was one asked for by the Atty. Gen's office and not his on the merits of the case. They still think the Washington constitution on monopolies is being violated and are figuring on an entirely new method of protecting themselves.

If the ASCAP concern wishes to do business in the State of Washington my opinion is they will have to take in their patrons in such a way as to overcome the "monopoly" angle.

For instance, ask a representative of the broadcasting stations, theaters, hotels and ballrooms to sit on a board with a representative of ASCAP for

(Testimony of John E. Savage.)

the purpose of fixing and agreeing upon the rates. This would take care of the "monopoly" side of the matter, and you would then be able to come into the State of Washington with clean hands and do business legitimately.

In the meantime, I do not believe it is the proper thing for me "to make an application" against their wishes.

Hope this finds you enjoying the Holiday Season and with best personal regards and good wishes, I am

Yours sincerely,

JOHN SAVAGE.

[Endorsed]: Pltfs. Ex. #13 adm. [110]

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Plaintiffs' Exhibit #14, copy of letter from Herman D. Kenin to John Savage, dated January 4, 1937, was then received in evidence.

PLAINTIFFS' EXHIBIT NO. 14

Mr. John Savage,  
c/o Trianon Ballroom,  
218 Wall Street,  
Seattle, Washington.

January 4, 1937

Re: American Society License  
Trianon Ballroom

Dear John:

I have your letter of December 28th. I can't understand how the music users of Washington can be incensed at ASCAP. Would you prefer to deal individually with the individual copyright owners

(Testimony of John E. Savage.)

of the selections played by your orchestras? Don't you think ASCAP is providing a service when they offer you a copyright pool?

You know as well as I do that the individual copyright owner cannot protect himself, and one of the reasons advanced for the dissolution of ASCAP by those resisting payment is so that the use of these valuable copyrighted properties may be made without compensating the copyright owner. The only way he can secure his rights as a practical proposition is by joining with others and protecting himself through an association.

ASCAP has never made it compulsory for anyone to secure a license from it. ASCAP has always been willing that users of music secure their licenses from individual copyright owners, but the plain truth is that none of them will do so. They insist upon their right to infringe. As it has been so aptly put, no one expects a thief, apprehended in the act of robbery, to speak well of the policeman who arrests him. We are the policemen in protecting the rights of our members, and we differ from the ordinary policemen in that no arrests are made until we have again and again cautioned the illegal operator to amend his ways.

You are infringing each night in your establishment. Evidence of this infringement is in our office. We have evidence of infringements running into hundreds of dollars in damages in the Trianon Ballroom, and I can assure you that when suit is brought against you in the Federal Courts of Wash-

(Testimony of John E. Savage.)

ington you will then discover that the property rights of our members will be protected under the United States Copyright Laws. [111]

The question of monopoly has been urged by those persons who wish to resist paying for the performance of these compositions on any basis. In other words, the claim is not against monopoly, but is a position taken to resist payment. You made the suggestion that the music users determine the fixing of rates. May I ask you how you would feel about having someone determine what you should get for property which belonged to you?

Now, let's be fair with one another. You know as well as I that the only purpose of the agitation which you speak is to keep from paying, and for no other reason.

I regret that it has become necessary for me to write this letter to you, but I am attempting to have you think of this thing clearly, and I hope that after receiving this letter you will reconsider this matter.

Very truly yours,

HERMAN D. KENIN.

[Endorsed]: Pltfs. Ex. #14 adm. [112]



(Testimony of John E. Savage.)

Mr. Belknap:

You served me with notice to produce this. (Indicating Exhibit #7)

The Court: Admitted.

Plaintiffs' Exhibit #7, copy of letter from Mr. Stanley to Trianon Ballroom, dated May 27, 1935, was then admitted in evidence.

PLAINTIFFS' EXHIBIT NO. 7

May 27, 1935

Trianon Ballroom,  
Trianon Co., Inc.,  
Seattle, Washington.

Registered Mail

Gentlemen:

License to publicly perform music copyrighted by members of this Society in your establishment, the Trianon Ballroom, at the yearly rate of \$300.00 expires July 1, 1935.

Pursuant to the terms of the contract, notice of cancellation thereof at the said expiration date is hereby given.

In explanation of this action permit us to say that under existing conditions it is no longer feasible for the members of this Society to continue in effect the rates which have heretofore prevailed covering license authorizing the public performance of their copyrighted musical works.

Assuming that you will desire to continue using in your programs after the above date of cancella-

(Testimony of John E. Savage.)

tion, music copyrighted by our members, we are enclosing form upon which please make application for license. Upon receipt of application, license at the new rate will then be forwarded for your consideration. The making of the application does not bind you to accept the license.

We avail ourselves of this opportunity to thank you sincerely for your cooperation heretofore given us which we do appreciate, and we hope that the friendly relationship may continue.

With all good wishes, we remain,

Sincerely yours,

AMERICAN SOCIETY OF  
COMPOSERS, AUTHORS  
AND PUBLISHERS,  
JOHN L. STANLEY,

District Manager.

JLS:MA

Enc. 1

[Endorsed] Pltfs. Ex. #7 adm. [101]

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### Redirect Examination

Mr. Savage:

I have paid all statements the Society ever sent me, amounting to about twenty-four hundred dollars.

Mr. Haugland:

I think the testimony is improper.

The Court:

It may be that the Court will disregard the answer, but he may answer.

(Testimony of John E. Savage.)

Mr. Savage (continuing):

I am not certain whether any other dance halls paid fees as high as ours or not. At the Butler we paid \$15 per month, at the Germania \$10 per month.

---

HERBERT W. HAUGLAND,

called as a witness for the defendants, after being duly sworn, was examined and testified as follows:

[40]

Direct Examination

I am a practising lawyer in Seattle and have represented the Society in certain matters for several years.

By sending notices of cancellation we recognized that licenses had previously been issued to some of the defendants.

I first knew that a temporary receiver had been appointed for the Society by reading about it in the newspaper, a temporary, general injunction was issued August 7, 1935, and the temporary receiver appointed 8-13-35 (C. R. B.) (H. W. H.)

Mr. Haugland:

In view of the turn which this case has taken I would like to ask the issuance of a subpoena duces tecum issued to the defendants so they will produce all of their records so we won't have any question

(Testimony of Herbert W. Haugland.)

about the copies. I apprehend that in each one of these three cases the same sort of contention will be made. Counsel says he wants some time to obtain further evidence. It is entirely agreeable to me that this case be continued to some day certain.

The Court: Is the motion resisted?

Mr. Belknap:

There are two motions. One for subpoena duces tecum for production of records or direction to the defendants to produce all their records and counsel has already admitted we have no records . . .

Mr. Haugland:

Coupled with a motion for continuance.

Mr. Belknap:

I will answer counsel's request. The two remaining defendants have absolutely no records of any kind. Regarding the notice of cancellation, there is none or any correspondence with the Society at all. The Tarry Inn and Lockhart Inn. They have absolutely no records whatever. [41]

Mr. Haugland: I am content then, and will not ask for a subpoena.

Mr. Belknap:

I will offer in evidence at this time a certified copy of an Order approving Final Report of Tracy E. Griffin as Receiver for the American Society of Composers, Authors and Publishers and all its affairs in this State.



(Testimony of Herbert W. Haugland.)

Mr. Haugland:

We have a copy showing he was finally discharged in June the next year. June, 1936. If counsel will stipulate this is a decree of dismissal in the case it may be introduced as an exhibit along with this, I have no objection.

Mr. Belknap:

I have no objection to this decree being introduced, but just to save labor of preparing it, won't you stipulate that Mr. Griffin was the receiver on the 21st day of August, 1935?

Mr. Haugland:

Sure. He was appointed as temporary receiver and we petitioned to remove the case to Federal Court and hearings were presented in the matter in Federal Court on a motion to remand. The motion to remand was granted. Then without any further notice to us a receiver was made permanent. Some time in February of 1936. He was discharged by the Court in Olympia in June, 1936.

The Court:

Both will be admitted, but neither of them have been identified by exhibit number. The copy of the decree and the copy of the order approving final report will be received in evidence.

Certified copy of order approving final report, etc., was then received in evidence and marked "Defendants' Exhibit #2".

(Testimony of Herbert W. Haugland.)

DEFENDANTS' EXHIBIT NO. 2

In the Superior Court of the State of Washington,  
for Thurston County.

No. 16114

STATE OF WASHINGTON ex rel,

G. W. HAMILTON, Attorney General,

Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS,

AUTHORS AND PUBLISHERS, an unin-  
corporated association, et al,

Defendants.

ORDER APPROVING FINAL REPORT, ETC.

Be It Remembered, this matter having come on to be heard before the undersigned Judge upon the final report of Tracy E. Griffin, as Receiver, filed herein, the defendant, American Society of Composers, Authors and Publishers, an unincorporated association, having appeared in this action and having approved said Final Report, and this Court having examined the same, taken evidence herein, and being advised in the premises,

It Is Ordered, Adjudged and Decreed that the Final Report of said receiver be and the same hereby is approved; and

It Is Ordered, Adjudged and Decreed that the non-action on the part of the receiver, during the period of time that ancillary proceedings in this

(Testimony of Herbert W. Haugland.)

cause were pending, either in the United States District Court or the Supreme Court of the State of Washington, be and the same hereby is approved; and

It Is Ordered, Adjudged and Decreed that the receiver has, at all times, faithfully performed his trust and the duties of his office throughout the term of this receivership; and

It Is Ordered, Adjudged and Decreed that the expenditures made by the receiver, aggregating the sum of \$656.67, as shown by his Final Report, be and the same hereby are approved and said expenditure confirmed; and [136]

It Is Ordered that all prior accounts be and the same hereby are approved and disbursements ratified and confirmed; and

That the receiver be and he hereby is charged with the sum of \$1,870.21, now on hand, of which sum \$829.47 are the proceeds of collections, less deductions made by the receiver subsequent to December 31, 1935; and

It Is Ordered, Adjudged and Decreed that, considering the status of the entire matter and that except for the ancillary proceedings pending, either in the United States District Courts or in the Supreme Court of the State of Washington, the receiver might have collected from users of copyrighted music in the State of Washington substantial sums due pursuant contract agreements expiring December 31, 1935, and that said sums should be by the receiver collected or the accounts liquidated,

(Testimony of Herbert W. Haugland.)

there be and hereby is awarded to Tracy E. Griffin, as receiver, in full of his compensation as receiver, in addition to the allowance heretofore made, all cash on hand, together with all sums due, owing and unpaid from users of copyrighted music publicly performed in the State of Washington to the defendant American Society of Composers, Authors and Publishers, an unincorporated association, according to the terms of existing contracts with said defendant, up to and including December 31, 1935, only, and expiring on such date, excepting therefrom, however, any balances which may remain unpaid to said defendant from license holders who have been making payments directly to the said defendant during this receivership, and upon such award being herewith made, same shall become the property of said receiver, individually, and he may individually, take such action for the collection thereof as he may individually be advised; and

It Is Ordered, Adjudged and Decreed that the receiver shall, forthwith, surrender unto the defendant American Society of Composers, Authors and Publishers, an unincorporated association, all other assets in his possession, the property of said defendant, and that he shall execute and file in the office of the Register of Copyrights, Library of Congress, at Washington, D. C., such papers and documents as may be requisite in the premises to reassign [137] and re-transfer unto said defendant, and respective members thereof, all interest of any and every nature whatsoever he may have or claim in and to



(Testimony of Herbert W. Haugland.)

the ownership of any copyright of said defendant, and/or any member thereof, and, for that purpose, if additional time be required, that he may execute such documents, using the designation of "Receiver", even if he has previously been discharged.

It Is Ordered, Adjudged and Decreed that reasonable compensation for any counsel that might have been employed by the receiver during the course of this receivership would not have been less than \$3,500.00, and, considering that the receiver was represented by E. P. Donnelly, Assistant Attorney General, the receiver be and he hereby is directed to pay, from out the proceeds and funds hereinabove awarded said receiver, such sum to said E. P. Donnelly as may be determined by said Donnelly and said receiver.

Done in Open Court this 8th day of June, 1936.

D. F. WRIGHT,

Judge.

State of Washington,  
County of Thurston—ss.

I, (signature illegible), County Clerk and Clerk of the Superior Court of the State of Washington, for Thurston County, holding a session at Olympia, do hereby certify that the foregoing is a true and correct copy of the original as the same appears on file and of record in my office. In Witness Whereof,

(Testimony of Herbert W. Haugland.)

I have hereunto set my hand and affixed the seal of said Court this 5th day of March, 1937.

[Seal] (Sgd.) Signature Illegible,  
Dep. County Clerk and Clerk of the Superior Court  
of Thurston County, State of Washington.

[Endorsed]: Dfts. Ex. #2 adm. [138]

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Printed copy of Decree in cause No. 16114,  
Superior Court for the State of [42] Wash-  
ington, Thurston County, dated June 8, 1936,  
was then admitted in evidence and marked  
“Plaintiffs’ Exhibit #15.”

#### PLAINTIFF’S EXHIBIT NO. 15

Copy by American Society of Composers, Authors  
and Publishers—Index 57

In the Superior Court of the State of Washington  
in and for Thurston County.

No. 16114

STATE OF WASHINGTON ex rel  
G. W. HAMILTON, Attorney-General,  
Plaintiff,

vs.

AMERICAN SOCIETY OF COMPOSERS,  
AUTHORS AND PUBLISHERS, an unin-  
corporated association, et al.,  
Defendants.

#### DECREE

This matter coming regularly on before the court  
for a hearing upon the petition of the defendant,

(Testimony of Herbert W. Haugland.)

American Society of Composers, Authors and Publishers, and all of the parties being present and represented by their attorneys; and the court having considered the files in said cause and having considered testimony offered at said hearing and the contents of the Petition which have not been denied, and having heard the arguments and advice of counsel, and being fully advised in the premises,

It Is Now Therefore Ordered, Adjudged and Decreed as follows:

1. The American Society of Composers, Authors and Publishers (hereinafter for brevity called the "Society"), a voluntary association of seven or more members, comprised exclusively of authors, composers and music publishers, was formed in the year 1914 under the laws of the State of New York, for the purpose of protecting and enforcing the so-called "small performing rights" of copyrighted musical works of such members, and to grant licenses to music users for the giving of public performances for profit of such works.

2. That since such formation, the Society has conducted its business, operations and activities in every State of the Union, as a central bureau for the issuance of licenses to music users for the public performance for profit of the works of its members, and through which performing rights of copyrighted musical works may be cleared, and *such a bureau is necessary to protect the performing rights of authors, composers and music publishers, and is a*

(Testimony of Herbert W. Haugland.)

*convenience and necessity to the users of music in obtaining the performing rights.\**

3. *That it is necessary for authors, composers and music publishers to belong to the Society to effectively enforce and protect the performing rights in their respective copyrighted works, and the Society is a convenience and a necessity to the users of music who will be considerably embarrassed, impeded, delayed and put to considerable expense if they had to deal separately with each piece of music performed and with each owner of the performing rights of each such piece.*

4. *That the Society was formed for lawful purposes and that the plan being used by the American Society of Composers, Authors & Publishers whereby licensing agreements are entered into between license users in the State of Washington and the American Society of Composers, Authors & Publishers, an unincorporated association, and wherein the defendant association acted as a clearing house in the representation of the copyright owners of said music, and as the same is being conducted, is approved as a working, feasible plan and is not **violative of any of the laws of the State of Washington, or of the Constitution.** [113]*

5. *That the Society serves a beneficial and useful and useful purpose as a clearing house through*

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\*Printer's Note: Italics, bold face and underscoring are the same as in the original.



(Testimony of Herbert W. Haugland.)

*which users may obtain and clear performing rights in musical compositions.*

6. The Receiver is hereby directed to collect all amounts due from contract license users up to and including the 31st day of December, 1935, save and except such users as have paid direct to the Society during said period, in respect of works of the present membership of the Society.

7. It is further ordered and the Receiver is hereby directed to turn over, assign, transfer and deliver to the defendant Society all rights, goods, properties, assets, agreements, licenses, books, records, papers, documents, memoranda and accounts, of every name, nature, character or description whatsoever which came into his possession, custody or control by virtue of his appointment as such Receiver, or to which he became entitled by virtue of such appointment, save and except any moneys on hand and claims for money due to January 1, 1936 (less costs and disbursements and expenses of the receivership.)

8. That all orders made herein, assigning, conveying, transferring to or vesting in the Receiver copyrights or rights in copyrights, are hereby vacated, set aside and annulled, and any and all such assignments of copyright or rights in copyrights are hereby canceled and annulled, and the Receiver is hereby directed and ordered to make, execute, acknowledge and deliver to the Society and to its members, in such form as may be necessary to carry

(Testimony of Herbert W. Haugland.)

out the purpose and intent of this order within five days of the entry of this decree, such papers and documents as may be required or necessary to reassign and retransfer unto the Society and its members all copyrights and rights therein claimed by the Receiver under such orders.

9. That any rights in the works of the members of the Society under any assignment, license or permit heretofore made, issued or granted by the Receiver, are hereby declared to be and shall be of no force, effect or validity beyond the 1st day of January 1936.

10. *That the complaint herein be dismissed upon the merits.*

11. It is further Ordered, Adjudged and Decreed that the Receiver, upon duly complying with the terms and conditions of this decree, shall be discharged and his bond exonerated.

Done in open court this 8th day of June, 1936.

[Signed] D. F. WRIGHT,

Judge.

State of Washington,  
County of Thurston—ss.

I, Edwidge LaFond, Dep. County Clerk and Clerk of the Superior Court of the State of Washington, for Thurston County, holding session at Olympia, do hereby certify that the foregoing is a true and correct copy of the original as the same appears on file and of record in my office. In Wit-

(Testimony of Herbert W. Haugland.)

ness Whereof, I have hereunto set my hand and affixed the seal of said Court this 11th day of June, 1936.

[Seal] (Signed) EDWIDGE LaFOND,  
Dep. County Clerk and Clerk of the Superior Court  
of Thurston County, State of Washington.

[Endorsed]: Filed Superior Court, Thurston Co., Wash., June 8, 3:01 P. M., 1936. Ellis C. Ayer, Clerk. By Edwidge LaFond, Deputy. [114]

[Endorsed]: Pltfs. Ex. #15 adm.

Mr. Haugland:

To save you the trouble of introducing any copies of the license agreement, I will produce the original copy of it. I am going to offer that in evidence.

Mr. Belknap: No objection.

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Memorandum of agreement, dated July 5, 1927, between the American Society of Composers, Authors and Publishers and the Trianon Company, Inc., was then received in evidence and marked "Plaintiffs' Exhibit #16."

#### PLAINTIFF'S EXHIBIT NO. 16

Memorandum of Agreement between American Society of Composers, Authors and Publishers, 56 West 45th Street, New York, N. Y. (hereinafter styled "Society"), and Trianon Company, Inc. (hereinafter styled "Licensee"), as follows:



(Testimony of Herbert W. Haugland.)

1. Society grants and Licensee accepts for a period of one year commencing July 1, 1927, a license to publicly perform at Trianon Ballroom, Seattle, Washington, and not elsewhere, nondramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited, unless consent of the Society in writing first be had.

3. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement, and receive pro rata refund of any unearned license fees.

4. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice



(Testimony of Herbert W. Haugland.)

in writing to the other of the desire to terminate the same at the conclusion of such year.

5. Upon any breach or default of any term or condition herein contained Society may upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

6. Licensee agrees to pay Society for the license herein the sum of Three Hundred Dollars (\$300.00), payable at the rate of \$75.00 on the first of each and every quarter.

In Witness Whereof, this agreement has been duly subscribed and sealed by Society and Licensee this 5th day of July, 1927.

[Seal]

AMERICAN SOCIETY OF  
COMPOSERS, AUTHORS  
AND PUBLISHERS,  
By CLARK R. BELKNAP,  
Agent and Attorney in Fact.  
TRIANON COMPANY, INC.,  
By JOHN E. SAVAGE.

[Endorsed]: Pltfs. Ex. #16 Adm. [115]

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HERMAN D. KENIN,

produced as a witness for the plaintiffs, after being duly sworn, was examined and testified as follows:

Direct Examination

I am an attorney practising in Portland, Oregon, and have been acting as representative of the

(Testimony of Herman D. Kenin.)

American Society of Composers, Authors and Publishers.

I dictated these letters (Plaintiffs' Exhibits #8, 11, 12.) They were addressed to the Trianon Ballroom and are my office copies.

Mr. Haughland:

I move they be admitted as exhibits.

Mr. Belknap:

Copy of letter, dated Dec. 1, 1936, from Herman D. Kenin to Trianon Ballroom, was then received in evidence, and marked "Plaintiffs' Exhibit #8."

#### PLAINTIFF'S EXHIBIT NO. 8

Registered December 1, 1936.  
Trianon Ballroom,  
218 Wall Street,  
Seattle, Washington.

Re: American Society License  
Trianon Ballroom

Gentlemen:

Musical compositions copyrighted by our members, list of whom is herewith enclosed, were publicly performed without license at your establishment on November 30th, 1936. Among the selections performed were the following:

11:44 P.M. "When I Grow Too Old to Dream"

11:46 P.M. "Would You"

11:53 P.M. "When Did You Leave Heaven"

(Testimony of Herman D. Kenin.)

We have heretofore endeavored to maintain in the State of Washington, for the convenience of and service to users of music in public performances, a branch office of our Society and a staff of field representatives to serve such users of music and our licensees. However, local State officials have taken such steps as to nullify our desire to render such service, and in these circumstances we are left no alternative but to make investigations of unlicensed establishments where music is publicly performed, and if infringements of the rights of our members are committed, to redress the same by legal action.

The purpose of this letter is to call your attention to the fact that the infringements were committed, and that we have now no alternative, as trustees for the rights of our members, but to bring suit in the Federal Court to redress the same.

We have no wish to do this, and are entirely willing to grant you a license to publicly perform the compositions copyrighted by our members, if you care to accept the same. Should this be your wish, please carefully fill in and return the enclosed form of application for license, whereupon a rate will be quoted you in line with the tariffs fixed by our Rate Committee, and a license submitted for your signature. If you do not care for a license, we urgently suggest that you discontinue at once the illegal public performance of any copyrighted musical works belonging to our members, as, if infringements are

(Testimony of Herman D. Kenin.)

continued, we will be obliged to file additional suits to redress the same. [102]

Not hearing from you by December 7th, 1936, we shall assume it is your preference that the suit be filed and complaints will thereupon be prepared and entered in the Federal Court of your district.

We sincerely hope that you will cooperate in avoiding litigation. We have no wish for it, but unless the rights of our members under the Copyright Laws of the United States are duly respected, we are left no alternative.

Very truly yours,

HERMAN D. KENIN,

Representative American  
Society of Composers,  
Authors and Publishers.

enc. application, list, env.

HDK D

[Endorsed]: Pltfs. Ex. #8 adm. [103]



(Testimony of Herman D. Kenin.)

Penalty for Private Use to Avoid Payment of  
Postage, \$300

Post Office Department

Official Business

Registered Article

No. 365764

Insured Parcel

No. ....

Postmark of Delivering  
Office

And Date of Delivery

Return to Herman D. Kenin

(Name of sender)

Street and Number

or Post Office Box, 1412 Public Service Bldg.,  
Portland, Oregon. [104]

### RETURN RECEIPT

Received from the Postmaster the Registered or  
Insured Article, the original number of which ap-  
pears on the face of this Card.

TRIANON BALLROOM

(Signature or name of addressee)

.....  
(Signature of addressee's agent)

Date of delivery, 12/2/36.

Form 3811

[Endorsed]: Pltfs, Ex. #8 adm. [105]

(Testimony of Herman D. Kenin.)

Copy of letter, dated Dec. 22, 1936, from Herman D. Kenin to Mr. John Savage, was then received in evidence and marked "Plaintiffs' Exhibit #11."

PLAINTIFF'S EXHIBIT NO. 11

December 22, 1936

Mr. John Savage,  
c/o Trianon Ballroom,  
Seattle, Washington.

Re: American Society License  
Trianon Ballroom

Dear John:

On December 1st registered notice was sent you of the fact that you were infringing upon copyrights belonging to the members of the American Society of Composers, Authors and Publishers. You were asked at that time to submit an application for the use of these selections. Three weeks have elapsed since that time, and to date no application has been received from you.

This is the last letter I shall write you on this subject. If an application for the use of these selections is not received by return mail, I shall have no other alternative but to report the matter to the New York office of ASCAP, after which, steps shall be taken to enforce these rights by means of the courts.

You are fully familiar with this situation, and I cannot understand your failure to reply.

(Testimony of Herman D. Kenin.)

Very truly yours,

HERMAN D. KENIN,

Representative American  
Society of Composers,  
Authors and Publishers.

HDK D

[Endorsed]: Pltfs. Ex. #11 adm. [108]

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Copy of letter, dated Dec. 15, 1936, from Herman D. Kenin to Mr. John Savage, was then received in evidence and marked "Plaintiffs' Exhibit #12." [43]

PLAINTIFF'S EXHIBIT NO. 12

December 15, 1936

Mr. John Savage,  
c/o Trianon Ballroom,  
Seattle, Washington.

Re: American Society License  
Trianon Ballroom

Dear John:

On December 8th I answered your letter of the 7th. A week has elapsed since that time, and you have failed to send in your application.

It is important that this matter be given your immediate consideration.

With kindest regards, I am

Sincerely,

HERMAN D. KENIN.

HDK D

[Endorsed]: Pltfs. Ex. #12 adm. [109]

(Testimony of Herman D. Kenin.)

Mr. Kenin:

I have known Mr. Savage for about fifteen years and have discussed the situation in the State of Washington with respect to license agreements. On December 1st, 1936, I sent him an application for a license agreement and asked him to fill it out. I received a reply but no mention was contained in it of the license application form. Mr. Savage did not contend or claim to me that he was operating under a license agreement.

He stated to me that he would not take out a license because he was working with the Association in the State of Washington, and also he didn't think it would be right. He said it wouldn't be cooperating with them if he filled out an application by reason of the fact that there were certain suits, legislation and other things going on here.

Some time after the decree of dismissal in the State case at Olympia I succeeded Mr. Jack Stanley as representative of the Society in the State of Washington. I succeeded to his office files and now have them in my possession.

Plaintiffs' Exhibit #7 was in these files, and purports to have been signed by Mr. John L. Stanley.

The procedure we follow in infringement suits is as follows: After evidence of infringement is discovered a registered letter is sent to the infringer calling his attention to the infringement or infringements and the necessity of having a license in order



(Testimony of Herman D. Kenin.)

to perform copyrighted compositions and enclosing a form of application in order to make lawful the unlawful performance.

This was done to Mr. Savage, as shown by Plaintiffs' Exhibit #8. Subsequently, I wrote Plaintiffs' Exhibit #10 on December 8th answering his letter of the 7th, and again on December 15th, which is Plaintiffs' Exhibit #12. I wrote him again on December 22nd, 1936, which is Plaintiffs' Exhibit #11, and then wrote him again on [44] January 4th, 1937, which is Plaintiffs' Exhibit #14, in answer to his letter of December 28th.

Mr. Haugland: You may cross examine.

Mr. Belknap: No questions.

Mr. Haugland: Plaintiff rests.

Mr. Belknap: I will recall Mr. Kenin.

---

### HERMAN D. KENIN,

recalled as a witness for the defendants in causes Nos. 1171 and 1172, was reminded that he was still under oath, and was examined and testified as follows:

#### Direct Examination

I came into possession and management of all the correspondence formerly had by Mr. Stanley. In that correspondence I did not find any notice of cancellation sent to either the Lockhart Inn or the

(Testimony of Herman D. Kenin.)

Tarry Inn, other than the notice of August 21st, 1935.

---

### JOHN G. LOCKHART,

produced as a witness for defendants, after being sworn, was examined and testified as follows:

#### Direct Examination

I have no recollection of having received any communication of any kind from the Society, or its representatives, after the suit was dismissed in Olympia in June, 1936, up to the time I was served with process in this suit.

#### Cross Examination

I reside at the Lockhart Inn, which is located on the Bothel Highway, just outside of Seattle.

Prior to June 8, 1936, I have had visits from representatives of the Society who have come out to collect from me. Subsequent to [45] June 8, 1936, no representatives have come out to see me.

The only license agreement I have had since June, 1936, is the original one taken out in 1931.

I have kept no correspondence file. The bills, I keep, the rest I throw away.

I do not remember receiving plaintiffs' Exhibit #17. "J. G. Lockhart" is my signature. I can't recall signing for a registered letter on the 16th day

(Testimony of John G. Lockhart.)

of December, 1936. I can't recall receiving a registered letter from Herman D. Kenin from Portland, Oregon, on the 16th day of December, 1936.

I have had no agents from the Society call on me since June 8, 1936, and I do not remember talking to a Mr. Merriwether and telling him he would have to see Mr. Heiman, my attorney.

---

HERMAN D. KENIN,

was recalled as a witness on behalf of plaintiffs and reminded that he was still under oath, after which he was examined and testified as follows:

Direct Examination

Plaintiffs' Exhibit #17 is a copy of a letter sent by registered mail to the Lockhart Inn on December 14th, 1936, attached to it is a return receipt which was returned to me in the mail.

Mr. Haugland:

I offer Plaintiffs' Exhibit #17 in evidence.

Mr. Belknap:

I object on the ground that he had a license and it was not cancelled and they have so stated.

The Court:

You are not objecting on the ground that it is a copy?

Mr. Belknap: No.

(Testimony of Herman D. Kenin.)

The Court:

Objection will be overruled and it will be admitted. [46]

Plaintiffs' Exhibit #17, a copy of a letter from Herman D. Kenin to Lockhart Inn, dated December 14, 1936, with attached return receipt, was then admitted in evidence.

PLAINTIFF'S EXHIBIT No. 17

December 14, 1936

Registered  
Lockhart Inn  
115th and Victory Way  
Seattle, Washington

Re: American Society License  
Lockhart Inn

Gentlemen:

Musical compositions copyrighted by our members, list of whom is herewith enclosed, were publicly performed without license at your establishment on December 10th, 1936. Among the selections performed were the following:

“A Beautiful Lady in Blue”

“When I Grow Too Old to Dream”

“You Came to My Rescue”

We have heretofore endeavored to maintain in the State of Washington for the convenience of and service to users of music in public performances, a branch office of our Society and a staff of field



(Testimony of Herman D. Kenin.)

representatives to serve such users of music and our licensees.

However, local State officials have taken such steps as to nullify our desire to render such service, and in these circumstances we are left no alternative but to make investigations of unlicensed establishments where music is publicly performed, and if infringements of the rights of our members are committed, to redress the same by legal action.

The purpose of this letter is to call your attention to the fact that the infringements were committed, and that we have now no alternative, as trustees for the rights of our members, but to bring suit in the Federal Court to redress the same.

We have no wish to do this, and are entirely willing to grant you a license to publicly perform the compositions copyrighted by our members, if you care to accept the same. Should this be your wish, please carefully fill in and return the enclosed form of application for license, whereupon a rate will be quoted you in line with the tariffs fixed by our rate Committee, and a license submitted for your signature. If you do not care for a license, we urgently suggest that you discontinue at once the illegal public performance of any copyrighted musical works belonging to our members, as, if infringements are continued, we will be obliged to file additional suits to redress the same. [116]

Not hearing from you by December 21st, we shall assume it is your preference that the suit be filed,

(Testimony of Herman D. Kenin.)

and complaints will thereupon be prepared and entered in the Federal Court of your district.

We sincerely hope that you will cooperate in avoiding litigation. We have no wish for it, but unless the rights of our members under the Copyright Laws of the United States are duly respected, we are left no alternative.

Very truly yours,

HERMAN D. KENIN,

Representative, American  
Society of Composers,  
Authors and Publishers.

enc. application, list. env.

HDK D [117]

Post Office Department  
Official Business

—

Registered Article

No. 365850

Insured Parcel

No. ....

Penalty for Private Use  
to Avoid Payment of  
Postage, \$300

Postmark of Delivering  
Office

Seattle, Wash

Dec 16

6 PM

University Sta

And Date of Delivery

Return to Herman D. Kenin

(Name of Sender)

Street and Number,

or Post Office Box, 1412 Public Service Bldg.

Portland

Oregon [118]

(Testimony of Herman D. Kenin.)

Return Receipt

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

Lockhart Inn

(Signature or name of addressee)

J. G. Lockhart

(Signature of addressee's agent)

Date of delivery, 12/16, 1936

Form 3811

[Endorsed]: Pltfs. Ex. #17 Adm. [119]

---

Mr. Kenin (continuing):

Mr. Lockhart has never tendered any fees or offered to make any payments to me for the privilege or in accordance with the terms of any license agreement since November 5, 1934, which was a payment of \$22.50.

Cross Examination

I have never sent Mr. Lockhart a statement because he did not have a license.

Redirect Examination

Plaintiffs' Exhibit #18 is the original copy or record on file of license established . . . I can't give the date of its issuance. Can give the date of its cancellation. It is an original record of the establishment known as Lockhart Inn. It shows it was cancelled as of 10/1/35 for delinquency and owes

(Testimony of Herman D. Kenin.)

for the period January 1, 1935, \$67.50 to October 1, 1935. Cancellation notice sent August 21, 1935. This record is part of our original records. We keep a card like this on all licenses.

Mr. Haugland:

I move that plaintiffs' Exhibit #18 be admitted.

Mr. Belknap:

I object on the same ground I have stated repeatedly. Any notice sent on that date would be of no force and effect. A receiver was in charge of their affairs then.

The Court:

Objection overruled. It will be admitted. It may be that it is without effect, if it is incomplete, but it will be admitted. [47]

Card record, with return receipt for registered letter attached, was then received in evidence and marked "Plaintiffs' Exhibit #18."



(Testimony of Herman D. Kenin.)

PLAINTIFF'S EXHIBIT No. 18

(Card)

2-185                      Can. 10-1-35 Del.

Lockhart Inn            Owes from 1-1-35 67.50

Seattle                      Yr. 90.00

8-21-35    Canc. sent

Post Office Department      (Postmarked Seattle,  
Official business              Washington, Aug 23

Registered Article                      10 AM

No. 327555                                      1935

Terminal Sta.)

Return to American Society of Composers,  
Authors and Publishers

1302 Yeon Building—Portland, Oregon

Portland,

Oregon

RETURN RECEIPT

Received from the Postmaster the Registered or  
Insured Article, the original number of which ap-  
pears on the face of this Card.

LOCKHART INN

(Signature of name of addressee.)

ANN GERRITZEN

(Signature of addressee's agent.)

Date of Delivery, 8-23, 1935.

Form 3811

[Endorsed]: Pltf's. Ex. #18 Adm. [120]

## MAURICE MERIWETHER,

recalled as witness for the plaintiffs, after being reminded that he was still under oath, was examined and testified as follows:

## Direct Examination

Early in February, I don't remember the exact date, the first or second week in February, 1937, I was directed to see Mr. Lockhart and ask him whether or not Mr. Jeffery Heiman was his attorney and for the Association at that time. He told me that Mr. Heiman was. I did not discuss with him the matter of whether he had a license or not.

Mr. Haugland:

We move for judgment on the case as it stands. Counsel has interposed no affirmative defense. Certainly he has not made a case that will satisfy the Court that he has a right to play the numbers.

The Court: Motion denied.

---

MR KENIN:

recalled as a witness for plaintiffs in cause No. 1172, after being reminded that he was still under oath, was examined and testified as follows:

## Direct Examination

The establishment operated by Tarry Inn, Inc., at 1409 First Avenue, in Seattle, is called Lyon's Music Hall. So far as I know the Society has never issued a license to Tarry Inn, Inc., to operate Lyon's Music Hall.

(Testimony of Herman D. Kenin.)

Plaintiffs' Exhibit #19 is the license agreement of Tarry Inn, Inc., to operate the Spider Web at 1409 First Avenue in Seattle. It was issued March 8th, 1935, with the limitation that not more than three musicians can be used or it will be null and void. [48]

Plaintiff's Exhibit #20 is the office record of the Spider Web, Seattle, Washington, from the records under my direction and purports to show license was cancelled as of September 1st, 1935, letter sent out August 21, 1935, return receipt attached to it.

Original license agreement between American Society of Composers, Authors and Publishers, and Spider Web and Tarry Inn, Inc., dated March 8, 1935, was then received in evidence without objection, and marked "Plaintiffs' Exhibit #19."

#### PLAINTIFF'S EXHIBIT No. 19

(General)

##### Copy

Memorandum of Agreement between American Society of Composers, Authors and Publishers, (hereinafter styled "Society"), and Tarry Inn, Inc. Spider Web, 1409 First Avenue, Seattle, Washington (hereinafter styled "Licensee"), as follows:

1. Society grants and licensee accepts for a period of one year commencing March 1st, 1935, a license to publicly perform at Spider Web, 1409 First Avenue, Seattle, Washington, and not else-

(Testimony of Herman D. Kenin.)

where, non-dramatic renditions of the separate musical compositions copyrighted by members of the Society.

2. This license is not assignable nor transferable by operation of law, devolution or otherwise, and is limited strictly to the Licensee and to the premises above named. The license fee herein provided to be paid is based upon the performance of such non-dramatic renditions for the entertainment solely of such persons as may be physically present on or in the premises described, and does not authorize the broadcasting by radio-telephone, transmission by wire or otherwise, of such performances or renditions to persons outside of such premises, and the same is hereby strictly prohibited unless consent of the society in writing first be had.

3. This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments or instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.



(Testimony of Herman D. Kenin.)

(b) Any work (or part thereof) whereof the stage presentation and singing rights are reserved.

4. Society reserves the right at any time to withdraw from its repertory and from operation of this license, any musical work, and upon any such withdrawal Licensee may immediately cancel this agreement. Either party to this agreement may, at any time, upon giving to the other party thirty days' prior notice in writing, by registered United States mail, terminate this agreement. Upon the termination of this agreement pursuant to any provision of this article "4", there shall be made to the Licensee a pro rata refund of any unearned license fees.

5. Licensee agrees, upon demand in writing of the Society, upon forms supplied by Society, whenever requested, to furnish a list of all music rendered at the premises hereby licensed, showing the title of each composition, and the publisher thereof.

6. Upon any breach or default of any term or condition herein contained Society may, upon notice in writing, cancel this license, and in event of such cancellation shall refund to Licensee any unearned fees paid in advance.

7. The parties hereto hereby agree that this agreement shall be deemed to be, and the same shall be, extended and renewed from year to year, unless either party, on or before thirty days next preceding the termination of any year, shall give notice in writing to the other by registered United States

(Testimony of Herman D. Kenin.)

mail of the desire to terminate the same at the conclusion of such year.

8. Licensee agrees to pay Society for the license herein the sum of One Hundred Eighty and no/100 .....Dollars (\$180.00) annually, payable quarterly in advance, \$45.00 per quarter.

\*This license rate to be in effect only as long as present policy is maintained; namely, not more than three musicians six days per week—no cover charge.

In Witness Whereof, this agreement has been duly subscribed and sealed by Society and Licensee this Mar. 8-1935.

AMERICAN SOCIETY OF  
COMPOSERS, AUTHORS  
AND PUBLISHERS  
By HERMAN GREENBERG  
Agent and Attorney in Fact  
SPIDER WEB-TARRY  
INN, INC.  
By M. M. LYONS

[Endorsed]: Pltfs. Exhibit #19 Adm. [121]

---

Mr. Haugland:

I offer Plaintiffs' Exhibit #20 in evidence.

Mr. Belknap:

Objection on the same ground as before.

The Court:

Objection overruled. It will be admitted.

(Testimony of Herman D. Kenin.)

Card Record, with return receipt attached,  
was then received in evidence and marked  
“Plaintiffs’ Exhibit #20.”

PLAINTIFF’S EXHIBIT No. 20

(Card)

|                                          |                      |
|------------------------------------------|----------------------|
| 2-43                                     | Can. 9-1-35 Del.     |
| Spider Web                               | Owes from 5-1-35     |
| Tarry Inn, Inc.                          | Yr. 180.00           |
| Seattle                                  |                      |
| 8-21-35                                  | Canc. sent           |
| Post Office Department                   | (Postmarked Seattle, |
| Official Business                        | Washington, Aug 23   |
| Registered Article                       | 10 AM                |
| No. 327553                               | 1935                 |
|                                          | Terminal Station)    |
| Return to American Society of Composers, |                      |
| Authors and Publishers                   |                      |
| 1302 Yeon Building, Portland, Oregon     |                      |
| Portland,                                |                      |
| Oregon                                   |                      |

RETURN RECEIPT

Received from the Postmaster the Registered or  
Insured Article, the original number of which ap-  
pears on the face of this Card.

SPIDER WEB

(Signature of name of addressee)

J. CURRY

(Signature of addressee’s agent)

Date of delivery, 8-22, 1935.

Form 3811

[Endorsed]: Pltf’s. Ex. #20, Adm. [122]

(Testimony of Herman D. Kenin.)

Mr. Kenin (continuing):

I have never received any money or offer of payment from Tarry Inn for any license.

Cross Examination

I have never sent him any statements because we only send statements to licensees. I know it refers in the contract to the Spider Web at 1409 First Avenue, and that is the same location as the Music Hall. It is the same premises but a different operation. A different establishment entirely.

---

MAURICE MERIWETHER,

recalled as a witness for the plaintiffs, was reminded that he was still under oath, examined, and testified as follows:

On December 4, 1936, I investigated the premises known as Lyons Music Hall, 1409 First Avenue, in Seattle, and observed that there were four musicians playing there, pipe organ, drums, saxophone and trumpet. [49]

Mr. Belknap:

I have no cross-examination. [50]

---

Tacoma, Washington

December 10th, 1938

Be It Remembered that the above entitled causes came on for further trial on the merits in the Court



Room of the above entitled court at Tacoma, Washington, at 10:00 o'clock in the forenoon of December 10th, 1938, before the Honorable Edward E. Cushman, United States District Judge, one of the Judges of said Court.

Plaintiffs in all cases were represented by H. W. Haugland of Seattle, Washington, and Herman D. Kenin, of Portland, Oregon. The defendants in all cases were represented by Clark R. Belknap of Seattle, Washington.

Mr. Haugland:

We have had taken some depositions . . . a deposition in each case, of Mr. Stanley. The depositions are here but they have not been published. We would like to have them published at this time.

The Court: Ordered published.

(Depositions in question were then published by the Clerk.)

Mr. Haugland: (reading)

---

“JOHN L. STANLEY:

He is called as a witness and, after being duly sworn, to tell the truth, the whole truth, and nothing but the truth, testifies as follows in answer to interrogatories:

“My name is John L. Stanley, residing at 1303 South College, Tulsa, Oklahoma, now District Manager for Western Electric Hearing Aids.

(Deposition of John L. Stanley.)

“I was connected with the American Society for nine years prior to April of 1938. I started in working for them as office boy in the New York office and continued upward to the position of District Manager in the Seattle office for the State of Washington and for Alaska. My position in the Seattle office was that of [51] District Manager.

“I was connected with the society during the month of August, 1935. I recognize plaintiff’s exhibit #7 as a carbon copy of a letter dictated by me to my secretary, Miss Marjorie Armitage, in Seattle, Washington. I caused this letter to be sent by registered United States mail and mailed in the Seattle Post Office. I recall this particular instance very well, due to the fact the Trianon Ball Room was one of the largest users of music in the State of Washington. I personally signed the letter. I caused the original of said exhibit to be prepared and signed the same and directed it to be mailed by registered United States mail in the Seattle Post Office.

“I had received no correspondence subsequent to May 27, 1935, with the Trianon Company, nor did I receive any correspondence from its officers.

“My recollection of the status of the account of the Trianon Company at the time of May 27, 1935, is that it was either paid to date or slightly delinquent.

“On two occasions subsequent to May 27, 1935, Mr. Savage, manager of the Trianon Ball Room,

(Deposition of John L. Stanley.)

called at my office for the purpose of discussing what the rate for his new license would be, inasmuch as it was no longer feasible for the Society to continue his canceled license at the previous rate. I recall that there was an express difference of opinion by Mr. Savage as to what Mr. Savage thought was a rate he should pay in comparison to the schedule of fees set forth by the American Society. The result of the first visit brought no conclusions and the same applies to the second visit to my office. I also had conversations with Mr. Savage at his office in the Trianon Ball Room relative to the prior cancellation of his license and the issuance of a new one. He refused to take out the new license up until the time I left the Seattle office. [52]

Cross-Interrogatories of Defendant  
Trianon Ballroom, Inc.

Yes. I married a niece of E. C. Mills, the general manager of the Society. Plaintiffs' exhibit #5 was mailed at the registry window of the United States Post Office at Seattle. I did not mail it personally, but instructed my secretary to mail it. I confirmed this mailing the next day.

I believe that a temporary receiver was appointed to take over the Seattle office, and believe that the date was August 13, 1935.

In order that there would be no question as to the Society's operations in the state of Washington after August 13, the Society instructed me to mail

(Deposition of John L. Stanley.)

from Portland, Oregon, letters to all the licensed establishments in Washington that, in accordance with their licenses with the Society, said licenses were to be cancelled by the Society. Beyond the mailing of these letters of cancellation, I had, and exercised, no authority over the establishments licensed by the Society in the state of Washington, after August 13, 1935.

The conversations I previously referred to as having had with Mr. Savage took place both in my offices in the Skinner building and in the offices of Mr. Savage in the Trianon Ball Room. These conversations took place during the months of June and July, 1935.

Making the Witness an Adverse Witness for the Defendant, the Following Interrogatories are Propounded.

The dancing establishments in the state of Washington that were paying as high fees as the Trianon Ball Room, to the best of my recollection were the Olympic Hotel in Seattle, the Century Ball Room north of Tacoma, and, undoubtedly, other establishments were paying fees as high, or higher, than the Trianon Ball Room.

Mr. Haugland:

I will now read the deposition in the Tarry Inn case, being [53] cause No. 1172, going directly to the testimony. (Reading)



“JOHN L. STANLEY,

He is called as a witness, and, after being duly sworn, to tell the truth, the whole truth, and nothing but the truth, testifies as follows in answer to interrogatories:

Plaintiffs' Exhibit #20 is a form file which was kept for any establishment whose license was cancelled for reason of delinquency insofar as their license fees are concerned. I caused this card to be made up by my bookkeeper after I instructed her to inform the proprietors that their license was to be cancelled for delinquency. It was prepared at my direction and as one of the original records that was kept by me. A similar card was kept on all establishments whose licenses may have been cancelled for similar reasons.

Plaintiffs' proposed exhibit marked for identification as exhibit A is a form letter which was sent to establishments in the State of Washington for reasons which appear to be explanatory in the contents of the letter.

The form letter referred to was then received in evidence marked “Plaintiffs' Exhibit #21, and is made a part hereof.

## PLAINTIFFS' EXHIBIT NO. 21

### EXHIBIT A

### FORM

(Copy)

Please be advised that your license to publicly perform musical compositions, copyrighted by our

(Deposition of John L. Stanley.)

members, expires as of September 1, 1935. The American Society of Composers, Authors and Publishers is no longer continuing, for the service of licensees, a representative in Seattle, for reasons with which you are no doubt acquainted.

The rights of our members, as copyright owners, are in no way affected by the pending litigation.

If you wish license to continue the lawful performance of musical works, copyrighted by our members, a list of which members is herewith enclosed, please so advise this office, and the necessary arrangements will be made from here.

Unless such license is secured, please do not permit such compositions to be rendered in your establishment, as if you do, we shall have no alternative but to protect, in the Federal Courts, the rights of our members.

Kindly let us know by return mail, if you wish this license.

Our inspectors regularly visit all unlicensed establishments to assure that the rights of our members are not infringed upon.

Under the copyright law of 1909, minimum damages for each infringement are fixed at \$250.00.

We have no wish to sue you—and we hope you will not make it necessary.

We thank you for business given us in the past, and hope to receive your answer with application for license, on the enclosed form, by return mail.

(Deposition of John L. Stanley.)

Yours very truly,

AMERICAN SOCIETY OF  
COMPOSERS, AUTHORS  
AND PUBLISHERS,  
JOHN L. STANLEY.

[Endorsed]: Pltfs. Ex. #21 adm. [123]

---

I believe at this time that plaintiffs' exhibit #21 does not have any connection with plaintiffs' exhibit #20. I think that another form letter, namely, a letter cancelling the licenses for delinquency, would have a bearing with exhibit #20. It is possible, however, that exhibit #21 could have a connection with exhibit #20 insofar as my office mailed the original of form exhibit #21 to proprietors of Tarry Inn.

I do not recall Tarry Inn as ever having a license under the name of Lyon's Music Hall. My recollection was that it was known as the Spider Web.

My recollection of the exact status of the account with the defendant company as of August 23, 1935, is that on that particular [54] day it was delinquent. The exact dollars and cents status I cannot recall.

I do not recall any specific conversations with the defendant relative to the status of his account, although it is quite possible that prior to August 12th I discussed the matter of the delinquent fees with the proprietor."

Mr. Haugland:

There were no cross interrogatories.

(Deposition of John L. Stanley.)

I will next read the deposition of John L. Stanley in the Lockhart case, being No. 1171. (Reading:)

“JOHN L. STANLEY:

He is called as a witness and after being duly sworn to tell the truth, the whole truth, and nothing but the truth, testifies as follows in answer to interrogatories:

Plaintiffs' Exhibit ..... is the same type of card as referred to in this question and was made up and kept for the same reason, namely; notice was sent to the establishment that the Society license, because of the delinquency of the license fees, was to be cancelled for that reason. I caused this exhibit to be prepared. I instructed my bookkeeper to type on it the necessary information as to the status of the account, and to send a letter to the establishment informing them that their Society license was to be cancelled for reason of its delinquency in fees. The letter was sent by Registered United States mail from Seattle. My office instructed the Post Office to inform us that the registered letter had been received by sending us a return receipt which is attached to the exhibit. When the return receipt came back from the Post Office I instructed my bookkeeper to attach it to the original card in the file and return it to the file.

Exhibit A is a form letter which was sent to establishments in the state of Washington for reasons which appear to be explanatory in the contents of



(Deposition of John L. Stanley.)

the letter. I do not believe at this time that Exhibit A has any connection with Exhibit #18. It is possible [55] however, that Exhibit A could have a connection with Exhibit #18 insofar as my office mailing the original of form Exhibit A to proprietors of John G. Lockhart and Jane Doe Lockhart.

Beyond the fact that the account was delinquent in its license fees, I do not recall the exact dollars and cents status of the account with defendant company as of August 23, 1935.

I recall on several occasions calling at the establishment of the defendant in an effort to collect the license fees, which were due the Society. I can't recall the exact wordage, beyond the fact that I requested the establishment to bring the account to date."

Mr. Haugland: There were no cross interrogatories.

I do not believe, counsel, that we have made a definite stipulation that these actions are consolidated for the purpose of trial, and that the evidence in one is to be considered in connection with the evidence in the other cases. Is that your understanding?

Mr. Belknap: Yes, any evidence applicable to the other cases. Any general testimony, yes.

## MAURICE MERIWETHER,

recalled as a witness for plaintiffs, was examined and testified as follows:

On approximately February 17th, 1937, I called on Mr. Lockhart and introduced myself, telling him I was with the Society and asked him if it was true that Mr. Heiman was representing him. He said that Mr. Jeffery Heiman was his attorney in these matters pertaining to the American Society of Composers, Authors and Publishers, and all dealings we would have with him must be done with Mr. Heiman.

Between February 4th and 23rd I had several conversations with Mr. Heiman, and after seeing Mr. Lockhart I again saw Mr. Heiman and at that time we were making contracts retroactive to [56] 1936 . . . as of January 1st, 1936. Mr. Heiman wanted us to date the contracts as of January 1st, 1937, assuring me that if that was done he would see that Mr. Lockhart would sign his license agreement.

Mr. Heiman did not contend that Mr. Lockhart was licensed.

Mr. Heiman represented other establishments besides Lockhart, the Lyons Music Hall being one.

Mr. Belknap: I have no questions and move to strike out all of his testimony as irrelevant and immaterial and having no bearing on the issues in this case.

The Court: Denied subject to consideration upon the whole case.

Mr. Haugland: In connection with the Tarry Inn case, I wish to introduce the form letters, the originals of which have been introduced in the Lockhart case.

Mr. Belknap: No objection.

Copies of letters dated Dec. 5, 1936, and January 12, 1937, both addressed to Lyon's Music Hall and signed by Herman D. Kenin, were then received in evidence and marked respectively "Plaintiffs' Exhibit #22 and Plaintiffs' Exhibit #23."

PLAINTIFFS' EXHIBIT NO. 22

December 5, 1936

Registered

Lyon's Music Hall,  
1409 First Avenue,  
Seattle, Washington.

Re: American Society License  
Lyon's Music Hall

Gentlemen:

Musical compositions copyrighted by our members, list of whom is herewith enclosed, were publicly performed without license at your establishment on December 4th, 1936. Among the selections performed were the following:

"Pennies From Heaven"

"When Did You Leave Heaven"

"You Turned The Tables On Me"

We have heretofore endeavored to maintain in the State of Washington for the convenience of and

service to users of music in public performances, a branch office of our Society and a staff of field representatives to serve such users of music and our licensees.

However, local State officials have taken such steps as to nullify our desire to render such service, and in these circumstances we are left no alternative but to make investigations of unlicensed establishments where music is publicly performed, and if infringements of the rights of our members are committed, to redress the same by legal action.

The purpose of this letter is to call your attention to the fact that the infringements were committed, and that we have now no alternative, as trustees for the rights of our members, but to bring suit in the Federal Court to redress the same.

We have no wish to do this, and are entirely willing to grant you a license to publicly perform the compositions copyrighted by our members, if you care to accept the same. Should this be your wish, please carefully fill in and return the enclosed form of application for license, whereupon a rate will be quoted you in line with the tariffs fixed by our Rate Committee, and a license submitted for your signature. If you do not care for a license, we urgently suggest that you discontinue at once the illegal public performance of any copyrighted musical works belonging to our members, as, if infringements are continued, we will be obliged to file additional suits to redress the same. [124]

Not hearing from you by December 12th, we shall assume it is your preference that the suit be filed,



and complaints will thereupon be prepared and entered in the Federal Court of your district.

We sincerely hope that you will cooperate in avoiding litigation. We have no wish for it, but unless the rights of our members under the Copyright Laws of the United States are duly respected, we are left no alternative.

Very truly yours,

HERMAN D. KENIN,

Representative American

Society of Composers,

Authors and Publishers.

[125]

---

Penalty for Private Use to Avoid Payment of  
Postage, \$300

Post Office Department

Official Business

Registered Article

No. 365785

Insured Parcel

No. ....

Postmark of Delivering Office

Seattle, Dec. 8, 3:30 P.M., 1936

Wash.

And Date of Delivery

Return to Herman D. Kenin

Street and Number,

or Post Office Box, 1412 Public Service Bldg.

Portland, Oregon [126]

## RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

Lyons Music Hall

(Signature or name of addressee)

Paul Wallace

(Signature of addressee's agent)

Date of delivery, 12/8, 1936.

[Endorsed]: Pltfs. Ex. #22 Adm. 12/10/38. [127]

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PLAINTIFFS' EXHIBIT NO. 23

January 12, 1937

Registered

Lyon's Music Hall,  
1409 First Avenue,  
Seattle, Washington.

Re: American Society License  
Lyon's Music Hall

We wrote you on December 5th calling your attention to the unlawful performance of our members' selections in the Lyon's Music Hall.

We cannot understand your failure to apply for a license to make this performance lawful. The only way we can protect our members against this confiscation of their valuable copyrights is either by issuing a license or by bringing action in the Federal Courts based upon copyright infringement. We hesitate to take this step, because if and when we do, and if we are able to prove that these selections have been performed without a license, the

infringer is required to pay not only court costs, attorneys' fees and costs of investigation, but damages as well. The law provides that the minimum amount of damages recoverable in these suits is \$250.00. We do not wish to add this burden to your cost of doing business, but in all fairness you must understand that we, as trustees, must enforce the law in behalf of our members.

On January 9th further evidence of infringement was obtained in your establishment. Among the selections reported were:

“Don't Blame Me”

“I'm in the Mood for Love”,

and many others.

Over thirty days have elapsed since we called your attention to the need for this license, and of course your previous experience with the Copyright Law should have informed you by this time that these rights must be respected.

We are again calling this matter to your attention with the hope that suit to protect our members' rights will not be necessary. We must have an immediate response.

Very truly yours,

HERMAN D. KENIN,

Representative American

Society of Composers,

Authors and Publishers.

enc. application, env.

HDK D

[Endorsed]: Pltfs. Ex. #23 adm. 12/10/38. [128]

Penalty for Private Use to Avoid Payment of  
Postage Due, \$300

Post Office Department

Official Business

Registered Article

No. 365873

Insured Parcel

No. ....

Postmark of Delivering Office

Seattle, Jan. 13, 3:30 P.M., 1937

Wash.

And Date of Delivery

Return to Herman D. Kenin

Street and Number,

or Post Office Box, 1412 Public Service Bldg.

Portland, Oregon [129]

### RETURN RECEIPT

Received from the Postmaster the Registered or  
Insured Article, the original number of which ap-  
pears on the face of this Card.

Lyons Music Hall

(Signature or name of addressee)

Irving H. Blowers

(Signature of addressee's agent)

Date of delivery, 1/12, 1937.

[Endorsed]: Pltfs. Ex. #23 Adm. 12/10/38. [130]



HERMAN D. KENIN,

produced as a witness for the plaintiffs, was sworn and examined as follows:

Direct Examination

I sent the originals of plaintiffs' exhibits #22 and #23 to Tarry Inn prior to the institution of suit. I did not receive any response except in general negotiations with Mr. Jeffery Heiman for licenses for all establishments claimed by him as clients. These negotiations were not successful in placing the establishments under license. These two exhibits are similar in form to the exhibits [57] that were sent to Lockhart. Our only response from Mr. Lockhart was through Mr. Heiman.

Mr. Belknap: No cross examination.

---

HERMAN D. KENIN,

produced as a witness for defendant, after being duly reminded that he was still under oath, was examined and testified as follows:

Direct Examination

I can't say, without consulting our records, what establishments were paying a higher license fee than the Trianon Ball Room. I know one establishment . . . the Olympic Hotel. I know their rate is higher than the Ball Room, but I am only trying to recall from memory. I do not know off hand what the exact rates of any establishments are.

## Cross Examination

The later license of the Olympic Hotel called for a rate of \$30 per month. I do not know what the 1935 rate was.

---

## JOHN E. SAVAGE,

produced as a witness for the defendants, was duly sworn and testified as follows:

## Direct Examination

I am familiar with the operation of the Olympic Hotel. They use three or four different ball rooms, lobby and dining room. They have sometimes as high as three orchestras at once. About a week ago I checked the post office records where all registered letters are sent from and the records are kept complete. The gentleman in charge of that department, Mr. Belknap and Mr. Lyons were with me at the time. He had a book that shows the complete record of May 27th, 28th and 29th. A big book with a record of every letter sent.

Q. In that record did you find any record of a letter purporting to be mailed by the American Society either to yourself individually [58] or the Trianon Ball Room?

Mr. Haugland: I object to that question . . . if he is attempting to testify what the records show I imagine the record would be the best evidence, not what he may have gathered from it. I object also on the grounds that he is not a competent witness to

(Testimony of John E. Savage.)

prove this. They could bring the clerk who is in charge of the records.

The Court: Objection overruled.

A. The Post Office department has no record of any such letter ever having been mailed through that office to me individually or the Trianon. I asked him specifically.

#### Cross Examination

I was not told by the Post Office department that they destroy all records of these letters after two years. The dates were stamped on the book. Anybody can see it.

The book contains a record of all registered letters sent through that office. There is a record in that book. . . every line has a different registry number and every letter registered out is marked right down. A permanent record is kept.

I have kept no office file of my letters and correspondence with the Society.

---

#### CLARK R. BELKNAP,

was sworn, as a witness for the defendant, and made the following statement:

If the court please, I would like to ask myself merely the question relative to the examination of those post office records. My testimony is identically the same as that of Mr. Savage. If counsel would like to have me go into specific details I will.

Mr. Haugland: I will object to his testimony on the same grounds as that of Mr. Savage, that it is not the proper way to establish the [59] record. We do not have the records here, and the witness is not competent to testify as to something of record.

The Court: Objection overruled. [60]

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Tacoma, Washington,  
February 13, 1939.

Be It Remembered that the above entitled causes came on for hearing upon the motion of the plaintiffs for judgment notwithstanding the memorandum decision or, in the alternative, for a new trial in the above entitled court at Tacoma, Washington, at 10:00 o'clock in the forenoon of February 13, 1939, before the Honorable Edward E. Cushman, United States District Judge, one of the Judges of the said court, and counsel for all parties being present and announcing themselves as ready, the following proceedings were had:

Mr. Haugland, attorney for the plaintiffs, presented his argument in support of his motion, and thereupon Mr. Belknap responded to the argument, and at the conclusion of the argument the Court announced that he was of the same opinion, and that he was going to give judgment for the defendants in the Trianon, Lockhart and Tarry Inn cases. The Court thereupon stated, with respect to the attorney's fees to be allowed:



The Court: You have stated Mr, Haugland, in the cases in which you prevailed, that you would be satisfied with a nominal attorney's fee. Are you still of the same mind?

Mr. Haugland: I am. I feel that nominal attorney's fees are the only fees that should be awarded in these cases.

The Court: In the Cleveland and Scribner cases, in which the plaintiff has prevailed, I will allow an attorney's fee of \$25 in each case, to be awarded in addition to the statutory fee. With respect to the cases in which the defendants have prevailed, Mr. Haugland, do you have any objection to an allowance of a fee of \$100 in each case? [61]

Mr. Haugland: I consider that such a fee would be extremely liberal. However, if the Court feels that such a fee should be allowed to the defendants, I am not going to raise any objection.

Mr. Belknap: I feel that the fee of \$100 would not be sufficient, and that a larger fee should be awarded to the defendants in these cases. I have no objection to the plaintiffs having a larger fee awarded to them in the cases in which they have prevailed.

The Court: Are you objecting to an allowance of \$100 as being reasonable in your cases, Mr. Belknap?

Mr. Belknap: I am. I desire to be heard on the matter.

The Court: Have counsel prepared the findings and the decrees for presentation this morning?

Mr. Haugland: I have my findings and decrees ready in the Scribner and Cleveland cases.

Thereupon the findings were presented in the Cleveland case and the Court made some corrections in said findings and signed the same. The form of the decree not being quite satisfactory, the parties agreed to get together and draft findings and decrees in conformity with suggestions made by the Court, and the cause was continued to some further date, when the matter should again be presented to the Court. [62]

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Tacoma, Washington,  
March 10, 1939.

Be It Remembered that the above entitled causes came on for hearing on the presentation and settlement of Findings of Fact, Conclusions of Law and Decrees, in the Court room of the above entitled court at Tacoma, Washington, at 10:00 o'clock in the forenoon of March 10th, 1939, before the Honorable Edward E. Cushman, United States District Judge, one of the Judges of said Court.

Plaintiffs in all cases were represented by H. W. Haugland of Seattle, Washington, and

Defendants in all cases were represented by Clark R. Belknap of Seattle, Washington, one of the attorneys of record in such cases, and the following proceedings were had:

Mr. Belknap: I will call Mr. Ross as a witness on the amount to be allowed as attorney's fees in these cases.

BERT C. ROSS,

called as witness on behalf of defendants, after being duly sworn, was examined and testified as follows:

Direct Examination

My name is Bert C. Ross. I am an attorney, practicing in Washington since 1915. I have served two terms on the Board of Governors of the State Bar Board. I have handled both civil and criminal cases.

Q. You have examined the files in the case of Buck vs. Trianon, Buck vs. Lockhart and Buck vs. Tarry Inn?

A. I haven't examined the file in court. I had exhibited to me some minutes ago your file with reference to the litigation.

Q. I will ask you to state what, in your opinion, would be a reasonable attorney fee to be allowed the defendant in each of those cases?

Mr. Haugland: Just a moment . . . I would like to object to the question as [68] calling for a conclusion of the witness, who has stated that he is not familiar with the issues in the case.

The Court: Objection overruled. You can develop any weakness in the testimony because of that fact in your cross examination.

A. My opinion is that \$100 per count would be a reasonable attorney's fee.

Cross Examination

I have not examined the court files. I read the pleadings in Mr. Belknap's file and I saw that there

(Testimony of Bert C. Ross.)

had been a considerable amount of preliminary motions disposed of. I couldn't tell you now what these were. My opinion of the issues involved in these cases is that they were copyright infringements, based upon the playing of certain copyrighted music in dance halls. I think that the cases would require a particular knowledge of copyright law, and this is one of the things I have taken into consideration in forming my opinion. If the performance of the musical numbers was admitted, that would eliminate some of the work of preparation, so far as the facts are concerned.

Q. Have you ever tried any copyright cases?

A. I have not.

Q. You do not know anything about fees to be awarded in copyright cases?

A. Yes. My opinion is influenced by what is shown to have been the allowances made by Federal courts.

Q. Mr. Belknap has shown you . . . has he, Mr. Ross . . . some decisions?

A. He has called my attention to some of the decisions.

Q. Because certain fees were allowed in certain cases, you deduce that similar allowances should be made here?

A. Not wholly that. I am frank to say that I am influenced quite considerably by those cases. [64]

Q. If the practice of this court had been to allow a fee of \$50, would that influence you?



(Testimony of Bert C. Ross.)

A. I would take that into account if it were called to my attention. That has not been called to my attention. I stated that \$100 was a proper amount for a fee per count. I am taking into consideration that a number of counts were tried together. Perhaps it would not make a great deal of difference whether there was one count or a dozen counts in each cause of action, excepting that there is involved the amount of a possible recovery against the client, and I have taken that into account. It is my understanding that the minimum recovery against defendants would be \$250 per count, and the maximum would be \$5,000 per count.

Q. Now, Mr. Ross, assuming that there is only one issue in the trial of this case that you are testifying about, and that is whether a pre-existing license was cancelled. That's the only issue . . . was a pre-existing license cancelled. Assuming that is the fact . . .

Mr. Belknap: I object to that.

Mr. Haugland: I haven't finished the question yet.

Q. (Continuing) —and that the question of the number of counts would be only incidental, the number of musical numbers or selections played at the defendant's place of business was only incidental. That is the only issue in this case, would your opinion with respect to the reasonableness of the attorney's fee be influenced by that . . .

Mr. Belknap: I object, if the court please, to the question because counsel well knows that is not

(Testimony of Bert C. Ross.)

in conformity with the facts. He [65] knows other defenses were set up and considered.

The Court: Objection sustained.

Mr. Ross: (continuing): I saw a voluminous file in each one of the defendants' cases. I would not undertake to specify the work that was done, but I was impressed with the amount of work that had been done in connection with each case. I examined the affirmative matter set up in defendants' answer, but I couldn't tell you now what it was. I do not consider myself an expert in this type of litigation. I read the affirmative matter in the answers some two or three months ago, and I am not an expert on pleadings, but I would try, myself, to plead it in a shorter number of pages. If the only defense was that the plaintiffs were an illegal combination, I do not think it would make any more work if there were one or five counts. With respect to the fact that most of defendants' counsel's work was in arguing the plaintiffs' motion to strike the affirmative matter, and the defendants' counsel presented that matter to the Court on several different occasions by way of reargument, I still think, if the defendants' counsel injected the issue in good faith, the fact that the Court held against him on each occasion should make no particular difference. I think the Court should take into account the amount of work which he did if it was done in good faith. My estimate of fees is not based upon any contingent basis. It is based upon the amount of work that

(Testimony of Bert C. Ross.)

was done. The fact that the Court held against him on that particular issue should not deprive counsel of being compensated for his work. My opinion here is arrived at on the same basis on the charge that should be made against the client. I know that it is true that the courts do not award as costs the same amount that one would charge against his clients. It has been my experience that the courts have [66] not awarded as costs the same fees which the attorney would charge his client.

The fact that five cases were consolidated for trial should be taken into account too. I am taking into account the fact that it has been a consolidation here, and I am also taking into consideration the number of counts in a case, and I am also taking into account the amount of possible recovery, whether for plaintiff or defendant. I have never had a copyright case myself, and I have never made a charge for services in a copyright case. I had a trademark litigation about 1932 or 1933 in Olympia, in the State court.

### Redirect Examination

In cases of suits on promissory notes, the practice is to ask for an attorney's fee upon each note. My attention was called to a case where a \$1,000 fee had been allowed. In none of these cases shown me by Mr. Belknap was there allowed a fee of less than \$100. I read about a half-dozen cases. I have



(Testimony of Bert C. Ross.)

not been impressed with the idea that the plaintiff was likely to recover more than \$250 per count.

### Recross Examination

The allowance of attorney's fees in suits on promissory notes is generally based upon a provision in the note, and if suits were brought up on a series of promissory notes, I do not think the Court would allow \$100 on each note as a reasonable attorney's fee. I think that the amount of work ordinarily involved on a promissory note is a much smaller proportion than is involved in this type of litigation here. I think that, even though the copyrights were admitted, that there would still be a question of copyright law involved in the case.

Q. What were the issues in this particular case that were more than the simple suit? I want you to be more specific. [67]

A. You would have to make provision for some of the defenses raised to it. You would have . . .

Q. You tell us. What are the defenses that involved copyright law that you have been talking about? What defenses in these cases involved any principle of copyright law or patent law?

A. The very bringing of the suit involving infringement immediately involves an investigation into copyright law. That very thing directs you to the copyright law. Then this affirmative defense of the matter of being an illegal combination, in order to present that defense and the law with reference to it, naturally a lawyer to do it would read the cases



(Testimony of Bert C. Ross.)

having to do with copyright infringement to find out if he could cases where successful defense was made because of illegal combination of the people holding the copyrights.

Q. That's in the preparation of the case?

A. That is in the preparation of the case.

Q. If those issues have been boiled down and you come to the trial of the case and it is much more simplified and the question is not over any infringement but is whether or not a license is cancelled, it is purely a simple question, is it not?

A. That one issue alone would be a simple issue . . . a simple issue of fact.

Q. Therefore the matter of attorneys' fees might be lessened in your opinion if that were the situation?

A. If that were the only issue here and the issues were made up on that basis to start with and there was no work other than preparation for the trial of an issue of fact I would think that \$100 per count was too much.

I testified that I had read five or six cases, and these cases were called to my attention by Mr. Belknap, and were the only ones that I have read, and I have given great weight to those cases. [68] If it were called to my attention that the Court had established a lower rate, and that the Court, in cases of default judgments, had allowed \$25 or \$50 as attorney's fees in this type of litigation, I think that I would take that into consideration.

(Testimony of Bert C. Ross.)

The Court: Five hundred dollars will be allowed in the Trianon case, four hundred dollars in the Tarry Inn case and seven hundred fifty dollars allowed in the Lockhart.

Mr. Haugland: Will the Court allow us an exception?

The Court: Exceptions allowed.

(The Court then signed Findings of Fact, Conclusions of Law and Decrees in all three cases submitted by the defendants and denied the Findings, Conclusions and decrees submitted by complainants, allowing exceptions in all cases.)

[Endorsed]: Filed Jun. 15, 1939. [69]

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[Title of District Court and Cause.]

#### APPELLANTS' STATEMENT OF POINTS

Come now the appellants above named, and each of them, and their counsel H. W. Haugland, of Sweeney & Haugland, and Herman D. Kenin, and respectfully stated that the points upon which they intend to rely in support of their claim that the District Court erred in granting judgment for the defendants in the three cases being appealed as one record, viz: Buck et alles vs. Trianon, Cause No. 1162, Buck et alles vs. Lockhart, Cause No. 1171, and Buck et alles vs. Tarry Inn, Cause No. 1170, and in refusing to grant judgment in each of the

three cases for the plaintiffs, in accordance with the allegations of the bills of complaint, are as follows:

I.

Referring to the Trianon case, Cause No. 1162:

1. That the court erred in refusing to grant judgment of infringement for the complainants.

2. That the court erred in holding that the defendant, the Trianon, had a valid and subsisting license from the American Society of Composers, Authors and Publishers on November 30, 1936, and further erred in holding that the said license had not been cancelled [70] theretofore by the said Society.

3. That the court erred in permitting, over objection, the testimony of John Savage and Clark Belknap, defendant's witnesses, with respect to their alleged search of postoffice records.

4. That the court erred in failing to hold that the conduct of the parties prior to November 30, 1936, showed a complete abandonment of any contractual relationship which might theretofore have existed between them.

5. That the court erred in granting defendant an attorney's fee in the sum of \$500, and that the said sum was exorbitant.

6. That the court erred in granting judgment for the defendant.

II.

Referring to the Lockhart case, Cause No. 1171:

1. That the court erred in refusing to grant judgment of infringement for the plaintiffs.

2. That the court erred in holding that the defendant had a valid and subsisting license agreement from the plaintiff Society on the 10th day of December, 1936, the date of the alleged infringements.

3. That the court erred in holding that the license of the defendants was not cancelled by the notice of cancellation of August 23, 1935.

4. That the court erred in failing to hold that the conduct of the parties prior to December 10, 1936, showed a complete abandonment of any contractual relationship which might theretofore have existed between them.

5. That the court erred in granting a judgment of attorney's fees to the defendants, and that the fees granted were exorbitant.

6. That the court erred in granting judgment for the [71] defendants.

### III.

Referring to the Tarry Inn case, Cause No. 1170:

1. That the court erred in refusing to grant judgment of infringement for the plaintiffs.

2. That the court erred in holding that the defendant had a valid and subsisting license agreement from the plaintiff Society on the 4th day of December, 1936, the date of the alleged infringements.

3. That the court erred in holding that the license of the defendant was not cancelled by the notice of cancellation of August 23, 1935.

4. That the court erred in failing to hold that the conduct of the parties prior to December 4, 1936, showed a complete abandonment of any con-



tractual relationship which might theretofore have existed between them.

5. That the court erred in granting a judgment of attorney's fees to the defendants, and that the fees granted were exorbitant.

6. That the court erred in granting judgment for the defendants.

H. W. HAUGLAND,

HERMAN D. KENIN,

Attorneys for Plaintiffs.

Received a copy of the Within this 27th day of June, 1939.

CLARK R. BELKNAP.

[Endorsed]: Filed Jun 29, 1939. [72]

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[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS  
OF LAW

This cause came on duly and regularly to be heard in open court, the plaintiffs appearing by their attorneys H. W. Haugland, Herman D. Kenin and Clifford D. O'Brien, and the defendant appearing by its attorneys Hammer & Pomeroy and Clark R. Belknap; and evidence having been duly and regularly introduced by and on behalf of the plaintiff and defendant; and the court after being fully advised in the premises, makes the following

## FINDINGS OF FACT:

## I.

That the plaintiff, American Society of Composers, Authors and Publishers, hereinafter referred to as the Society, was duly organized under the laws of the State of New York; that all of the corporate plaintiffs and the defendant are duly organized corporations.

## II.

That each and all of the musical works named in plaintiff's bill of Complaint were, at all dates mentioned in the complaint, and now are owned by the incorporated plaintiffs in this suit.

## III.

That the various musical works named in the bill of complaint were performed by defendant at the time and place alleged in the complaint; that prior to the date of said performances, the plain- [78] tiffs issued a license to defendant granting the right to perform in its place of business the afore-said musical works, which license was in effect on the date of said performances.

## IV.

That \$500.00 is a reasonable sum to be allowed the defendant as attorney's fees in this suit.

Done in Open Court this 10th day of March, 1939.

EDWARD E. CUSHMAN,

Judge.

And from the foregoing Findings of Fact the court makes the following

Conclusions of Law

First: That plaintiffs take nothing and that their cause of suit be dismissed with prejudice and held for naught.

Second: That the defendant is entitled to a judgment against the plaintiffs and each of them for the sum of \$500.00 as and for attorney's fees and for its costs herein.

Done in Open Court this 10th day of March, 1939.

EDWARD E. CUSHMAN,

Judge.

Presented by:

CLARK R. BELKNAP,

Atty. for Def.

[Endorsed]: Filed Mar. 10, 1939. [74]

United States District Court, Western District of  
Washington, Northern Division.

No. 1162

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPELL & CO., INC., a corporation, and POPULAR MELODIES, INC., a corporation,

Plaintiffs,

vs.

TRIANON COMPANY, INC., a corporation,  
Defendant.

### DECREE

This cause came on for trial at this term of court on the 14th day of October, 1938, and all parties being present in court and represented by counsel, and both sides announcing themselves ready for trial, the court proceeded to hear the evidence, and all the evidence being concluded on behalf of both parties, and the matter being submitted to the court for its consideration and determination, and the court having duly considered the proofs offered, and being fully advised in the facts and premises, and having caused findings of fact and conclusions of law to be prepared, reduced to writing, and to be signed and filed herein, it is by the court

Ordered, Adjudged and Decreed as follows:



First: That plaintiffs take nothing, and that their cause of suit be, and the same is hereby dismissed with prejudice, and held for naught.

Second: That the defendants have judgment against the plaintiffs, and each of them, in the sum of \$500 as and for attorneys' fees, and for its costs of this suit to be taxed, and that defendant have execution therefor. [75]

Done in Open Court this 10th day of March, 1939.

EDWARD E. CUSHMAN,

Judge.

Presented by:

CLARK R. BELKNAP,

Atty. for Def.

[Endorsed]: Filed Mar. 10, 1939. [76]

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[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE MEMORANDUM DECISION, AND, IN THE ALTERNATIVE, MOTION FOR A NEW TRIAL OR PETITION FOR REHEARING.

Come now the complainants above-named, and each of them, and respectfully move the court for a judgment in favor of the complainants, in accordance with the prayer in the Complaint contained, notwithstanding the Memorandum Decision of the Court, for the reason and on the grounds that

the said decision is contrary to the law and to the evidence submitted in the case.

CLIFFORD D. O'BRIEN,

HERMAN D. KENIN,

H. W. HAUGLAND,

Solicitors for Complainants.

Without waiving the foregoing motion for judgment notwithstanding the Memorandum Decision, but still insisting upon the same, but as an alternative motion, and in the event that the same be not granted, the complainants, and each of them, move the court for a [77] new trial and petition the court for a re-hearing, for the following causes materially affecting the substantial rights of the complainants.

1. That the court has failed to consider the effect of the abandonment by the parties herein of all contractual relations prior to the institution of this suit, and that the judgment announced is contrary to the law and the evidence in the case.

2. Insufficiency of the evidence to justify the decision.

CLIFFORD D. O'BRIEN,

HERMAN D. KENIN,

H. W. HAUGLAND,

Solicitors for Complainants.

Copy of the within motion received this 3rd day of Feb., 1939.

CLARK R. BELKNAP,

Atty. for Def.

[Endorsed]: Filed Feb. 3, 1939. [78]

In the United States District Court for the Western  
District of Washington, Northern Division.

No. 1162

GENE BUCK, President of A.S.C.A.P., etc.,  
Plaintiff,

vs.

TRIANON COMPANY, INC.,  
Defendant,

No. 1171

GENE BUCK, President of A.S.C.A.P., etc.,  
Plaintiff,

vs.

JOHN G. LOCKHART, et ux.,  
Defendant,

No. 1172

GENE BUCK, President of A.S.C.A.P., etc.,  
Plaintiff,

vs.

TARRY INN, INC.,  
Defendant.

### RECORD OF HEARING.

Present H. W. Haugland, Attorney for plaintiffs  
and Clark R. Belknap as attorney for defendants.  
Mr. Belknap now presents arguments on motion to  
dismiss Case #1170 and Case #1164. Motion de-

nied. Mr. Belknap states cases will be appealed. (This is not to serve as Notice of Appeal). Findings of Fact and Conclusions of Law in Cause 1164 (Cleveland) submitted by Mr. Haugland. He agrees to attorney fees of \$20.00 which is equivalent to docket fee and not in addition to docket fee. Findings of Fact and Conclusions of Law are now signed as interlined by the Court. Counsel agree to the interlineations. Decree is submitted and the same is returned to counsel to be rewritten. Findings of Fact and Conclusions of Law in Cause #1170 (Scribner) are to be rewritten to follow that in Cause 1164; decree to be rewritten also. Mr. Haugland addresses the Court in re Motion for New Trial in Cases 1162, 1171 and 1172, on grounds of inconsistent defenses. The Motion is denied, the Court holding that equity rules and practice provide that the defenses do not have to be consistent. The Court concludes the contracts were not cancelled in the manner that was available for their cancellation; Court not prepared to hold that there was an abandonment. Findings of Fact and Conclusions of Law and Decrees in Causes 1162, 1171 and 1172 to be presented by Mr. Belknap, and at the same time Mr. Belknap is to be prepared to give testimony [79] regarding attorneys' fees. Presentation of Findings, Conclusions, Decrees and testimony re attorneys' fees noted for Monday, February 20, 1939, at 10:00 A. M., at Tacoma.

Taken from Journal No. 26, page 503. [80]



[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Gene Buck, as President of the American Society of Composers, Authors and Publishers, and Robbins Music Corporation, a corporation, Chappel & Co., Inc., a corporation, and Popular Melodies, Inc., a corporation, plaintiffs above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the decree and findings of fact and conclusions of law entered in this case on the 10th day of March, 1939, hereby appealing from the judgment of the District Court dismissing plaintiffs' cause of action, and granting defendant's costs and attorneys' fees.

Signed SWEENEY & HAUGLAND,

H. W. HAUGLAND,

Attorneys for Appellants Gene Buck as President of the American Society of Composers, Authors and Publishers, Robbins Music Corporation, Chappel & Co., and Popular Melodies, Inc.

[Endorsed]: Filed Apr. 20, 1939. [81]

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Maryland Casualty Company  
Baltimore

SUPERSEDEAS AND COST BOND  
ON APPEAL

Know All Men By These Presents: That we, Gene Buck, as President of the American Society of Composers, Authors and Publishers, and Rob-

bins Music Corporation, a corporation, Chappel & Co., Inc., a corporation, and Popular Melodies, Inc., a corporation, as Principals, and the Maryland Casualty Company, a corporation created and existing under the laws of the State of Maryland, with its principal office located in Baltimore, Maryland, as Surety, are held and firmly bound unto Trianon Company, Inc., a corporation, in the sum of Seven Hundred Fifty (\$750.00) and no/100 Dollars in lawful money of the United States, to be paid to the said defendants, for which payment well and truly to be made we bind ourselves, and our heirs, executors and administrators, successors and assigns jointly and severally by these presents.

Signed and sealed this 20th day of April, 1939.

The Condition of this obligation is such, that whereas, said plaintiffs feeling aggrieved at the judgment entered in the above entitled court against said plaintiffs desire to appeal to the Circuit Court of Appeals for the 9th Circuit, from the decree and findings of fact and conclusions of law entered in this case on the 10th day of March, 1939, and from the judgment of the said District Court dismissing plaintiffs' cause of action and granting defendants costs and attorneys' fees.

Now Therefore, if the said principals shall satisfy in full any judgment entered on appeal together with costs, interest and damage for delay if for any reason the appeal is dismissed, or if the judgment is affirmed and shall satisfy in full such modification of the judgment and such costs, interest and dam-

ages [82] as the Appellate Court may adjudge and award, then this obligation to be null and void; otherwise to remain in full force and virtue.

GENE BUCK,

President of the American  
Society of Composers,  
Authors and Publishers.

ROBBINS MUSIC

CORPORATION, a corp.  
CHAPPEL & CO., INC., a corp.  
POPULAR MELODIES, INC.,  
a corp.

By H. W. HAUGLAND, Atty.

Attorneys for Appellants Gene Buck, President of  
the American Society of Composers, Authors  
and Publishers, and Robbins Music Corpora-  
tion, a corporation, Chappel & Co., Inc., a cor-  
poration, and Popular Melodies, Inc., a corpo-  
ration.

[Seal]

MARYLAND CASUALTY  
COMPANY,

By WALTER E. MORRIS,

Attorney-in-Fact.

Above bond approved: April 20th, 1939.

EDWARD E. CUSHMAN,

Judge. [83]

State of Washington,  
County of Pierce—ss.

On this 20th day of April, 1939, before me per-  
sonally appeared Walter E. Morris to me known

to be the attorney in fact of the corporation that executed the within and foregoing instrument, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] (Sgd.) A. Van SCHRRMERROHM,  
Notary Public in and for the State of Washington,  
residing at Tacoma.

My Commission expires Oct. 5th, 1942.

[Endorsed]: Filed Apr. 20, 1939. [84]

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[Title of District Court and Cause.]

MOTION FOR CONSOLIDATION  
FOR PURPOSES OF APPEAL

Come now the plaintiffs herein, by their attorneys undersigned, and respectfully move the Court for an order consolidating for purposes of appeal with the above entitled cause, cause number 1171, being the case of Buck et alles vs. Lockhart, and cause number 1172, being the case of Buck et alles vs. Tarry Inn, Inc., and further respectfully moves that



all of said three cases be consolidated for purposes of appeal and that for appeal purposes the entries be all made in the instant cause, and that one record be brought up to the Circuit Court of Appeals under the said cause number 1162. This motion is based upon the records and files herein, and upon the affidavit of H. W. Haugland hereto attached.

SWEENEY & HAUGLAND,  
(Sgd.) H. W. HAUGLAND,  
Attorney for Plaintiffs.

State of Washington,  
County of King—ss.

H. W. Haugland, being first duly sworn, on oath deposes and says: [85]

That he is one of the attorneys for the complainants, and makes this affidavit in support of a motion to consolidate the above designated three cases for purposes of appeal. Affiant states that at the time of the trial the three cases were tried at one and the same time. That it was stipulated and ordered in the trial that the three cases be consolidated for purposes of trial. That the proceedings were reported at the trial, and that there was but one transcript covering the proceedings in all the cases. That there was no segregation of testimony for each case, and that it would be an unnecessary duplication and repetition of material if three separate transcripts are prepared and presented to the Appellate Court. Affiant further states that the issues

are the same in each of the three cases, and that affiant believes that it is for the best interests of all parties that the said causes be consolidated for purposes of appeal.

H. W. HAUGLAND.

Subscribed and sworn to before me this 29th day of April, 1939.

JOSEPH A. SWEENEY,  
Notary Public in and for the State of Washington,  
residing at Seattle.

[Endorsed]: Filed May 1, 1939. [86]

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[Title of District Court and Cause.]

MOTION FOR EXTENSION OF TIME  
FOR FILING RECORD

Come now the plaintiffs above named and respectfully move the Court for an order extending the time for filing the record on appeal until July 15, 1939, for the reason that there is now pending in the Circuit Court of Appeals a motion to consolidate three cases for appeal, and the records can not be prepared until the said motion has been disposed of. Plaintiffs further move for an order extending the time for filing appellants' designation of contents of the record on appeal until a reasonable time after

the Circuit Court has ruled upon said motion for consolidation.

SWEENEY & HAUGLAND,

H. W. HAUGLAND,

Attorney for Plaintiffs.

To the defendants above named, and to Clark R. Belknap, attorney for defendant:

Please take notice that the undersigned will present the within motion to the Honorable Edward C. Cushman at Tacoma, Washington, on May ....., 1939, at 10:00 a. m.

SWEENEY & HAUGLAND,

Attorney for Plaintiffs.

[Endorsed]: Filed May 11, 1939. [87]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME  
FOR FILING RECORD

This matter coming regularly before the undersigned Judge of the District Court on the 11th day of May, 1939, on the motion of plaintiffs for an order extending the time for filing record in the Circuit Court of Appeals, and the Court being fully advised, does here and now

Order, Adjudge and Decree that the time for filing the record on appeal in the Circuit Court of Appeals be, and the same is hereby extended up to and including the 1st day of July, 1939.

Done at Tacoma, Wash., this 15th day of May, 1939.

EDWARD E. CUSHMAN,  
Judge.

Presented by:

SWEENEY & HAUGLAND,  
H. W. HAUGLAND,  
Attorney for Plaintiffs.

Received copy of the within order May 13, 1939.

CLARK R. BELKNAP,  
Attorney for Defendant.

[Endorsed]: Filed May 15, 1939. [88]

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[Title of District Court and Cause.]

ORDER EXTENDING TIME  
FOR FILING RECORD

This matter coming regularly before the undersigned Judge of the District Court on the 27th day of June, 1939, on the motion of plaintiffs for an order extending the time for filing record in the Circuit Court of Appeals, and the Court being fully advised, does here and now

Order, Adjudge and Decree that the time for filing the record on appeal in the Circuit Court of Appeals be, and the same is hereby extended up to and including the 15th day of July, 1939.



Done In Open Court At Tacoma this 27th day of June, 1939.

EDWARD E. CUSHMAN,  
Judge.

Presented by:

B. H. CAMPERSON,  
Attorney for Plaintiff.

Approved:

CLARK R. BELKNAP,  
Attorney for Defendant.

[Endorsed]: Filed Jun 27, 1939. [89]

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

Come now the appellants and hereby designate the contents of its record on appeal as follows:

1. Complaint
2. Pages 1 and 2 of the amended answer and cross complaint, and Paragraph XXXVIII of the affirmative matter in the said amended answer, (being found on page 16 thereof.)
3. Order striking affirmative defense
4. Reply
5. Stipulation as to the evidence
6. Plaintiffs' narrative statement, filed herewith, of all the testimony
7. Appellants' statement of points
8. Plaintiffs' exhibits Nos. 1 to 23, inclusive

9. Findings of fact, conclusions of law, and decree

10. Motion for judgment notwithstanding the memorandum decision, and in the alternative, motion for new trial or petition for rehearing

11. Order denying motion for new trial

12. Notice of appeal [90]

13. Bond on appeal

14. Motion to consolidate for purposes of appeal

15. Motion for extension of time for filing record

16. Order extending time for filing record

17. This designation

18. Defendants' Exhibits Nos. 1 and 2

19. Order extending time for filing record—filed 6-27-39.

SWEENEY & HAUGLAND,

H. W. HAUGLAND,

Attorneys for Plaintiffs.

Received copy of the within June 9, 1939.

CLARK R. BELKNAP,

Atty. for Def.

[Endorsed]: Filed Jun 15, 1939. [91]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
TRANSCRIPT OF RECORD

United States of America,

Western District of Washington—ss.

I, Elmer Dover, Clerk of the United States District Court for the Western District of Washing-

ton, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 138, both inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by designation of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of the said District Court at Seattle, and that the same constitute the record on appeal herein from the Decree of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellants for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

|                                                                              |         |
|------------------------------------------------------------------------------|---------|
| Appeal fee (Sec. 5 of Act).....                                              | \$ 5.00 |
| Clerk's fees (Act Feb. 11, 1925) for making<br>record, certificate or return |         |
| 31 folios @ 15c.....                                                         | 4.65    |
| Clerk's fees (Act Feb. 11, 1925) for compar-<br>ing record:                  |         |
| 302 folios @ 5c.....                                                         | 15.10   |
| Certificate of Clerk to Transcript of Record                                 | .50     |
|                                                                              | <hr/>   |
| Total .....                                                                  | \$25.25 |

I further certify that the above cost for preparing and certifying record, amounting to \$25.25, has been paid to me by the attorneys for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 8th day of July, 1939.

[Seal]

ELMER DOVER,

Clerk.

United States District Court for the Western District of Washington.

By ELMO BELL,

Deputy.

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[Endorsed]: No. 9231. United States Circuit Court of Appeals for the Ninth Circuit. Gene Buck, as President of the American Society of Composers, Authors and Publishers, and Robbins Music Corporation, a corporation, Chappel & Co., Inc., a corporation, and Popular Melodies, Inc., a corporation, Appellants, vs. Trianon Company, Inc., a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed July 10, 1939.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.



United States Circuit Court of Appeals for the  
Ninth Circuit.

No. 9231

GENE BUCK, as President of the American Society of Composers, Authors and Publishers, and ROBBINS MUSIC CORPORATION, a corporation, CHAPPELL & CO., INC., a corporation, and POPULAR MELODIES, INC., a corporation,

Plaintiff,

vs.

TRIANON COMPANY, INC., a corporation,  
Defendant.

### DESIGNATION OF THE RECORD

To the Trianon Company, Inc., appellee, and to  
Clark R. Belknap, attorney for appellee.

You, and each of you, will hereby take notice that the appellants above named do hereby designate the entire contents of the record as being required for printing, and do hereby give notice to the Clerk of the Circuit Court that we respectfully request the Clerk to print the entire record for the transcript on appeal.

H. W. HAUGLAND,  
HERMAN D. KENIN,  
Attorneys for Appellants.

Received copy of the within this 17th day of July, 1939.

CLARK R. BELKNAP,

Atty for Appellee.

[Endorsed]: Filed Jul 20, 1939. Paul P. O'Brien, Clerk.

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[Title of District Court and Cause.]

### APPELLANT'S STATEMENT OF POINTS

Come now the appellants above named, and each of them, and their counsel, H. W. Haugland, of Sweeney & Haugland, and Herman D. Kenin, and respectfully state that the points upon which they intend to rely in support of their claim that the District Court erred in granting judgment for the defendants in the three cases being appealed as one record, viz: Buck et alles vs. Trianon, Cause No. 1162, Buck et alles vs. Lockhart, Cause No. 1171, and Buck et alles vs. Tarry Inn, Cause No. 1170, and in refusing to grant judgment in each of the three cases for the plaintiffs, in accordance with the allegations of the bills of complaint, are as follows:

#### I.

Referring to the Trianon case, Cause No. 1162 in the District Court:

1. That the court erred in refusing to grant judgment of infringement for the complainants.
2. That the court erred in holding that the defendant, the Trianon, had a valid and subsisting

license from the American Society of Composers, Authors and Publishers on November 30, 1936, and further erred in holding that the said license had not been cancelled theretofore by the said Society.

3. That the court erred in permitting, over objection, the testimony of John Savage and Clark Belknap, defendant's witnesses, with respect to their alleged search of postoffice records.

4. That the court erred in failing to hold that the conduct of the parties prior to November 30, 1936, showed a complete abandonment of any contractual relationship which might theretofore have existed between them.

5. That the court erred in granting defendant an attorney's fee in the sum of \$500, which sum was exorbitant.

6. That the court erred in granting judgment for the defendant.

## II.

Referring to the Lockhart case, Cause No. 1171 in the District Court:

1. That the court erred in refusing to grant judgment of infringement for the plaintiffs.

2. That the court erred in holding that the defendant had a valid and subsisting license agreement from the plaintiff Society on the 10th day of December, 1936, the date of the alleged infringements.

3. That the court erred in holding that the license of the defendants was not cancelled by the notice of cancellation of August 23, 1935.

4. That the court erred in failing to hold that the conduct of the parties prior to December 10, 1936, showed a complete abandonment of any contractual relationship which might theretofore have existed between them.

5. That the court erred in granting a judgment of attorney's fees to the defendants, and that the fees granted were exorbitant.

6. That the court erred in granting judgment for the defendants.

### III.

Referring to the Tarry Inn case, Cause No. 1170 in the District Court:

1. That the court erred in refusing to grant judgment of infringement for the plaintiffs.

2. That the court erred in holding that the defendant had a valid and subsisting license agreement from the plaintiff Society on the 4th day of December, 1936, the date of the alleged infringements.

3. That the court erred in holding that the license of the defendant was not cancelled by the notice of cancellation of August 23, 1935.

4. That the court erred in failing to hold that the conduct of the parties prior to December 4, 1936, showed a complete abandonment of any contractual relationship which might theretofore have existed between them.

5. That the court erred in granting a judgment of attorney's fees to the defendants, and that the fees granted were exorbitant.



6. That the court erred in granting judgment for the defendants.

HERMAN D. KENIN,

H. W. HAUGLAND,

Attorneys for Appellants.

Received a copy of the within this 17th day of July, 1939.

CLARK R. BELKNAP,

Atty for Appellees.

[Endorsed]: Filed July 20, 1939.

